184

Supreme Court, U.S.
FILED

No. 10-1152 MAR 17 2011

OFFICE OF THE CLERK

In the Supreme Court of the United States

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Petitioner,

v.

OAKLAND COUNTY MEDICAL EXAMINER AND OAKLAND COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

PATRICK J. PEROTTI, ESQ.
DWORKEN & BERNSTEIN CO., L.P.A.
60 SOUTH PARK PLACE
PAINESVILLE, OHIO 44077
(440) 352-3391
(440) 352-3469 FAX
pperotti@dworkenlaw.com

JOHN H. METZ, ESQ.
Counsel of Record
1117 EDWARDS ROAD
CINCINNATI, OHIO 45208
(513) 321-8844
(513) 321-6389 FAX
metzlegal@aol.com

Counsel for Petitioner

March 17, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

Whether there is a fundamental right to bury a loved one's remains that is protected by the Federal courts and Constitution which cannot be eliminated by a state legislature?

Whether federalism prevents a state court from holding that certain property rights are NOT protected by the U.S. Constitution against taking without due process, where a federal circuit court in prior published decisions announced that such rights ARE federally protected?

Whether a state court ruling on what constitutes a property right under state law may be applied in a way that retroactively destroys federal taking rights which have already vested?

Whether the Michigan Supreme Court violated the U.S. Constitution in ruling that next of kin have no right to burial of their loved one's remains post autopsy, where the remains are no longer needed for any government interest?

PARTIES

Petitioner is Karen Waeschle, individually and on behalf of others similarly situated.

Respondent is Ljubisa J. Dragovic, Individually and in his official capacity as Medical Examiner of Oakland County, Michigan and Oakland County, Michigan a municipal corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS AND ISSUES 5

REASONS FOR GRANTING THE PETITION .. 12

1. The right to disposition of the remains of a deceased loved one is constitutionally fundamental in a civilized society and cannot be abolished by the states. 12

2. Where it has previously been decided as the law of the Circuit that certain conduct is a violation of the federal Constitution, fundamental principles of federalism prevent a federal court from certifying a question to the state supreme court about the legality of that conduct. 15

3. While a state supreme court can prospectively change its interpretation and application of state law, which may prospectively change the analysis of a federal constitutional question dealing with due process and property rights, a state court may not retroactively change its law and thereby eliminate vested federal Constitutional rights. 24

4. The right to bury a loved one is a fundamental right of liberty or religion which is protected by the U.S. Constitution. 28

CONCLUSION 34

APPENDIX

Appendix A: Opinion, State of Michigan Supreme Court (October 29, 2010) 1a

Appendix B: Amended Opinion/Amended Judgment, United States Court of Appeals for the Sixth Circuit (August 14, 2009) 8a

Appendix C: Opinion/Judgment, United States Court of Appeals for the Sixth Circuit (July 22, 2009) 34a

Appendix D: Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, United States District Court Eastern District of Michigan, Southern Division (September 19, 2008) 59a

Appendix E: Order denying rehearing, Michigan Supreme Court (December 17, 2010) 79a

Appendix F: Order, United States Court of Appeals for the Sixth Circuit (October 23, 2009) 81a

TABLE OF AUTHORITIES

CASES

Abbeville Gen. Hosp. v. Ramsey,
3 F.3d 797 (5th Cir. 1993) 21

Albrecht v. Treon,
118 Ohio St. 3d 348 (Ohio 2008) 14

Arizonans for Official English v. Ariz.,
520 U.S. 43 (1997) 15

Ark. Chronicle v. Easley, 321 F. Supp. 2d 776, 790-791 (E.D. Va. 2004) *rev'd on other grounds*, *Ark. Chronicle v. Murphy*, 183 Fed. Appx. 300 (4th Cir. 2006) 20

Arnaud v. Odom,
870 F.2d 304 (1989) 32

Bellotti v. Baird,
428 U.S. 132 (1976) 15

Blount v. Sterling Healthcare Group,
934 F. Supp. 1365 (S.D. Fla. 1996) 21

Board of Regents v. Roth,
408 U.S. 564 (1972) 16, 18

Bouie v. Columbia,
378 U.S. 347 (1964) 26, 27

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 27

Brotherton v. Cleveland,
923 F.2d 477 (6th Cir. 1991) . . . . . *passim*

Danforth v. Minnesota,
552 U.S. 264 (2008) 21

Daniels v. Williams,
474 U.S. 327 (1986) 29

Dennis v. Higgins,
498 U.S. 439 (1991) 20

Dennis v. Mitchell,
68 F. Supp. 2d 863 (N.D. Ohio, 1999) 21

FMC v. Shoshone-Bannock Tribes,
905 F.2d 1311 (9th Cir. 1990) 21

Fuller v. Marx,
724 F.2d 717 (8th Cir. 1984) 33

Griswold v. Connecticut,
379 U.S. 926, 85 S.Ct. 328 (1964) 13

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 26

Howlett v. Rose,
496 U.S. 356 (1990) 17, 20, 22

Huddleston v. Dwyer,
322 U.S. 232 (1944) 17

Hughes v. Washington,
389 U.S. 290 (1967) 22

Kuhn v. Fairmont Coal Co.,
215 U.S. 349 (1910) 17

Legal Envtl. Assistance Found. v. Pegues,
904 F.2d 640 (11th Cir. 1990) 20

Marbury v. Madison,
5 U.S. 137 (1803) 21, 33

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 28

Newman v. Sathyavaglswaran,
287 F.3d 786 (9th Cir. 2002) 29

Parratt v. Taylor,
451 U.S. 527, (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986) 29

Perry v. Sindermann,
408 U.S. 593 (1972) 16

Pierce v. Proprietors of Swan Point Cemetery,
10 R.I. 227 (R.I. 1872) 31

Pohutski v. City of Allen Park,
465 Mich. 675 (2002) 26

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 24

Richards v. Jefferson Cnty.,
517 U.S. 793, 804 (1996), *citing Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) 27

Rochin v. California,
342 U.S. 165, 72 S.Ct. 205 (1952) 13

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 17

Thomas v. Am. Home Prods.,
519 U.S. 913 (1996) 19

Turpin v. Mailet,
579 F.2d 152 (2d Cir. 1978) 14

United States Term Limits v. Thornton,
514 U.S. 779 (1995) 20

United States v. Craft,
535 U.S. 274 (2002) 18, 19, 27

W. Tenn. Chptr. of Assoc. Builders & Contrs., Inc. v. City of Memphis,
138 F. Supp. 2d 1015 (W.D. Tenn. 2000 14

West v. American Tel. & Tel. Co.,
311 U.S. 223 (1940) 17

Whaley v. Cnty. of Tuscola ex rel. Tuscola Cnty. Bd. of Comm'rs,
58 F.3d 1111 (6th Cir. 1995) . . . . . *passim*

You Yang Yang v. Sturner,
728 F. Supp. 845 (D.R.I. 1990) 32

CONSTITUTION

U.S. Const. amend. VII 2
U.S. Const. amend. XIV 2, 28

STATUTES

42 U.S.C. § 1983 . . . . . 3, 7, 28, 32
28 U.S.C. §1257(a) 2

RULES

Sup. Ct. R. 10 2
Civ. R. 12(b)(6) 3, 8
Civ. R. 56 . . . . . 3, 8
6 Cir. I.O.P. 206 . . . . . 3, 10

OTHER AUTHORITIES

Tegg, W: *The Last Act: Being the Funeral Rites of Nations and Individuals*. London: William Tegg & Co, 1876 33

OPINIONS BELOW

The opinions below are the Michigan Supreme Court's decision in *In re Certified Question from the United States District Court for the Eastern District of Michigan, Karen Waeschle, individually and on behalf of others similarly situated, Plaintiffs v. Oakland County Medical Examiner and Oakland County, Defendants*, No. SC 140263, Supreme Court of Michigan, October 29, 2010, and the court's denial of rehearing, *In re Certified Question from the United States District Court for the Eastern District of Michigan, Karen Waeschle, Plaintiff v. Oakland County Medical Examiner, and Oakland County, Defendants*, Nos. SC 140263, (22), US Dist: 08-10393, Rehearing No. 574, Supreme Court of Michigan, December 17, 2010 are unpublished but are reproduced in the Appendix at A and E respectively.

In the prior federal court proceedings the decision of the district court was not officially reported but is reproduced in the Appendix at D. The first opinion of the Sixth Circuit was not officially reported but is available at 072209 FED6, 08-2228 and is reproduced in the Appendix at C. The Amended opinion for the Sixth Circuit was published and can be found at 576 F.3d 539 (6th Cir. 2009) and is reproduced in the Appendix at B. The Sixth Circuit's order declining en banc review was not reported but is reproduced in the Appendix at F.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to grant her petition for a Writ of Certiorari to review the Michigan Supreme Court decision in *Waeschle v.*

Oakland County Medical Examiner, Case No. 140263, which was decided on October 29, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). Motion for rehearing was denied *Waeschle v. Oakland County Medical Examiner*, Case No. 140263, on December 17, 2010. This Court also has jurisdiction pursuant to United States Statutes, Title 28 Appendix, Rules of the Supreme Court of the United States, Part III. Jurisdiction on Writ of Certiorari, Rule 10(a),(b) and (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VII [1791]

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. XIV, § 1 [1868]

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6 Cir. I.O.P. 206:

> (c) Published Opinion Binding
>
> Reported panel opinions are biding on subsequent panels. Thus, no subsequent panel overrules a published opinion or a previous panel. Court en banc consideration is required to overrule a published opinion of the court. (Dec. 1, 1998)

STATEMENT OF THE CASE

Petitioner brought this action in federal court, on behalf of herself and others similarly situated, pursuant to 42 U.S.C. Section 1983 which provides redress for the violation of rights secured by the Constitution and laws of the United States. Petitioner's claim was that the Medical Examiner for Oakland County, Michigan, violated petitioner's protected rights when after he had completed his autopsy and his jurisdiction ceased, he destroyed her mother's brain. The medical examiner provided no notice to petitioner that her mother's brain had been retained when the rest of her mother's remains were released to petitioner and did not afford petitioner the opportunity to direct the disposition of her mother's brain in accordance with her personal and religious beliefs.

Defendants moved to dismiss petitioner's claims pursuant to Civ. R. 12(b)(6) on the basis that petitioner had failed to state a claim on the issue of the existence of a constitutionally protected right and moved for summary judgment pursuant to Civ. R. 56 on the basis of qualified immunity. On September 19, 2008 the District Court ruled that the petitioner had

constitutionally protected right in her loved one's dead body and that those rights were clearly established based upon specific Circuit precedent. Accordingly, the District Court denied defendants' motions to dismiss and for summary based on qualified immunity. The District Court did dismiss petitioner's state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress. *Waeschle v. Dragovic*, Case No. 08-10393, 2008 U.S. Dist. LEXIS 73103 (E.D. Mich., Sep. 19, 2008).

Defendants appealed the denial of summary judgment on the basis of qualified immunity to the Sixth Circuit under the collateral order doctrine. The Sixth Circuit reversed the denial of summary judgment as to the individual-capacity claims based on qualified immunity (7/22/09). The panel then withdrew the opinion and issued a revised opinion, which still was contrary to Circuit precedent, but also "certified" the case to the Michigan Supreme Court (8/14/09). As to the official capacity claims and the claims against the political subdivision the panel directed the District Court to certify a question to the Michigan Supreme court concerning petitioner's rights under Michigan law as to whether they were clearly established. *Waeschle v. Dragovic*, 576 F.3d at 551.

Petitioner moved for a rehearing *en banc* on the basis that the panel decision was in direct conflict with the binding precedent of the Sixth Circuit as articulated in *Whaley v. Cnty. of Tuscola ex rel. Tuscola Cnty. Bd. of Comm'rs*, 58 F.3d 1111 (6th Cir. 1995) and *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) which had already found these rights to be "clearly established" and entitled to Federal protection. On October 23, 2009 the Sixth Circuit denied

petitioner's petition for rehearing. *Waeschle v. Dragovic*, Case No. 08-2228, 2009 U.S. App. LEXIS 23708 (6th Cir. Oct. 23, 2009). A petition for writ of certiorari was filed with the U.S. Supreme Court which declined jurisdiction. *Waeschle v. Dragovic*, Case No. 09-879, declining jurisdiction on March 29, 2010.

The Michigan Supreme Court then heard the certified question and held that Michigan law does not give the next of kin any right in disposition of the body of a loved one after an autopsy is complete and the body is "no longer needed" for any government purpose. *Waeschle v. Oakland County Medical Examiner*, Case No. 140263, which was decided on October 29, 2010. A motion for rehearing was denied unanimously *Waeschle v. Oakland County Medical Examiner*, Case No. 140263, on December 17, 2010, and the instant petition for certiorari followed.

STATEMENT OF FACTS AND ISSUES

Petitioner Karen Waeschle, plaintiff below, is the daughter of Katherine R. Weins, who is deceased. After Katherine Weins died the Medical Examiner for Oakland County, Michigan, or others on his behalf, took possession of her body and performed an autopsy. Several organs including the brain were removed for study. When the coroner was finished with the organs, he returned all except the brain, which he kept and then destroyed. This conduct was admitted to be established practice by the defendant and coroners in general.

Petitioner was never informed by the medical examiner that he had retained her mother's brain

when her mother's body was released to her. As a result, petitioner buried her mother without all of her body parts, and without any notice from defendants of that fact. Petitioner never gave consent or permission to defendants to remove and keep her mother's brain or to destroy it.

Katherine Weins' brain was not the only organ examined during the autopsy. Katherine Weins' heart, lungs, liver, stomach and other organs were examined as well. These other organs were returned to petitioner when the autopsy was completed. The brain, when examined, is removed and "fixed" by soaking it in a chemical solution for 10-14 days to make it firm enough for dissection and examination.

Katherine Weins' brain was not retained as evidence, as is permissible if a criminal matter is contemplated. It was only retained for examination, but it was not returned and was instead destroyed once its examination was completed. Petitioner has never questioned the "police power" of the State to perform the autopsy; however, the Michigan statutes do not empower the Medical Examiner to destroy federally protected property rights. While the State may take temporary custody of property, it may not, without notice and due process, destroy it.

With regard to the rights of the next of kin to possess the remains of their next of kin for disposition in accordance with their personal and religious beliefs, the relatively short delay required for the examination of the brain is not a valid basis for distinguishing Katherine Weins' brain from her body generally or from the other organs which were returned to her next of kin. No interest of the state would have been

impaired by releasing Katherine Weins' brain for disposition as directed by her daughter once the examination had been completed, just as had been done with Katherine Weins' body and other organs.

Petitioner brought this action on behalf of herself and others similarly situated in United States District Court for the Eastern District of Michigan pursuant to 42 U.S.C. Section 1983 against the Oakland County Medical Examiner, individually and in his official capacity, and against the Board of Commissioners of Oakland County. Petitioner's claim rested on the Sixth Circuit's decisions in *Whaley v. Cnty. of Tuscola ex rel. Tuscola Cnty. Bd. of Comm'rs*, 58 F.3d 1111 (6th Cir. 1995) *and Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), as well as well established Michigan law.

In *Whaley*, which specifically dealt with Michigan law, the Sixth Circuit looked at the rules and understandings related to the remains of decedents in Michigan, and at Michigan Supreme Court decisions, and concluded that "[t]he Supreme Court of Michigan has repeatedly held that the next of kin '[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way.'" *Whaley*, 58 F.3d at 1115. In accordance with this precedent, the District Court held that "[b]ased on Michigan Supreme Court precedent, as interpreted by the Sixth Circuit Court of Appeals, this Court holds that Waeschle states a 42 U.S.C. §1983 cause of action under the Fourteenth Amendment Due Process Clause." *Waeschle v. Dragovic*, 2008 U.S. Dist. LEXIS 73103 at *14. Like the present matter, *Whaley* did not deal with the

entire body, but with the return of one of the parts (in *Whaley*, the eyes.)

Petitioner's claim was not about the state's police power right to conduct an autopsy and not about the state's right to remove her mother's organs for examination during that procedure. Those state interests admittedly take temporary precedence over the petitioner's interest in her mother's remains. The basis of petitioner's claim is that after Katherine Weins' brain was no longer needed for examination, petitioner had a right to direct its disposition. Specifically, petitioner was entitled to notice that her mother's brain was retained for examination and an opportunity to direct the disposition of all of her mother's remains in accordance with her personal and religious beliefs. No such notice or opportunity was provided. Instead, petitioner was never advised that the remains released to her did not include her mother's brain and was never allowed to make a decision as to the disposition of all of her mother's remains after the autopsy was completed. As the District Court explained in its September 19, 2008 Order, "[t]he issue in this case is whether Waeschle has a property interest in Weins' brain—a protected by the United States Constitution— such that she was entitled to notice that Weins' brain was not included with her other remains."

The Decision of the District Court

Defendants moved to dismiss pursuant to Civ. R. 12(b)(6) and for summary judgment pursuant to Civ. R. 56. The basis for defendants' motion to dismiss was that petitioner had failed to state a claim on the issue of the existence of a constitutionally protected right

and, as to the state law claims of intentional and negligent infliction of emotional distress, on the basis of governmental immunity. Defendants also sought summary judgment claiming that there was no genuine issue of material fact that defendants were immune. Defendants also asked the trial court to certify a question to the Michigan Supreme Court concerning the property interest Michigan recognizes in the remains of a deceased loved one.

The District Court concluded that "Waeschle has a federally protected constitutional right to her mother's body parts, grounded in the Fourteenth Amendment Due Process Clause." *Waeschle v. Dragovic*, 2008 U.S. Dist. LEXIS 73103 at *3. The court also concluded that "[t]hat right is clearly established" *Id.* The District Court granted defendants' motion to dismiss the state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress.

The District Court found no need to certify any question to the Michigan Supreme Court. In this regard, the District Court concluded that "[t]his Court finds no question that Michigan law may resolve is presented here. The property right is sufficiently established, and whether that right rises to the level of a "legitimate claim of entitlement," protected by the Due Process Clause of the Fourteenth Amendment, is a matter of federal law." *Id* at *18. The District Court adhered to the binding precedent of *Whaley* and *Brotherton* which clearly established the "Federal right."

The Decision of the Sixth Circuit

On appeal the Sixth Circuit panel reversed the denial of summary judgment as to petitioner's claims against the medical examiner in his individual-capacity. *Waeschle v. Dragovic*, 576 F.3d 539, 551 (6th Cir. 2009). This Sixth Circuit panel concluded that a Michigan state court might conclude that Michigan does not grant property rights in the remains of the next of kin. While the panel seemed to be trying to avoid Circuit's precedent by claiming this case was "distinguishable" as involving a "legitimate forensic study" it ignored the fact that the body parts taken in *Brotherton* and *Whaley* were likewise taken during "legitimate forensic studies." Rather, the panel used a troubling process which invited the state supreme court to weigh-in with its agreement or disagreement with Circuit precedent. That might be unremarkable if the state court were being asked to conclude state law matters as the underpinning of federal rights for FUTURE cases. Instead, the panel sought to allow the state court to make a pronouncement for the purpose of retroactively overturning vested federal rights. This panel's fiat clearly violated the Sixth Circuit's own internal operating procedure. (6th Cir. I.O.P. 206 (c) which provides that one panel may not unilaterally overrule a prior panel's ruling.)[1]

---

[1] **6 Cir. I.O.P. 206:**
(c) Published Opinion Binding

Reported panel opinions are biding on subsequent panels. Thus, no subsequent panel overrules a published opinion or a previous panel. Court en banc consideration is required to overrule a published opinion of the court. (Dec. 1, 1998)

This Sixth Circuit panel thus abdicated its most important function by announcing that it 'would not reach' the issue of whether there was a federally protected constitutional right.[2]

The Sixth Circuit panel directed the District Court to certify the following question to the Michigan Supreme Court

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

But as the District Court concluded, and as the Sixth Circuit itself held previously in *Whaley,* there is no question but that under Michigan law that such property right was already established. It was announced as "circuit precedent" in two prior cases and it binds the conduct of persons in that Circuit, and is not subject to retroactive overruling by a state court. Remember, the conduct at issue in the instant case all occurred under *Whaley* as the law of the circuit. It was therefore improper for the Sixth Circuit to certify this question to the Michigan Supreme Court.

---

[2] The court noted that "[o]ur qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established." *Waeschle v. Dragovic*, 576 F.3d at 544.

Petitioner timely requested a rehearing *en banc* of the basis that the panel's decision conflicted with the binding precedent of the Sixth Circuit as articulated in *Whaley v. Cnty. of Tuscola ex rel. Tuscola Cnty. Bd. of Comm'rs*, and *Brotherton v. Cleveland*. On October 23, 2009 the Sixth Circuit denied petitioner's petition for rehearing. *Waeschle v. Dragovic*, Case No. 08-2228, 2009 U.S. App. LEXIS 23708 (6th Cir. Oct. 23, 2009). Petitioner then file a for a writ of certiorari to the U.S. Supreme Court which declined jurisdiction at that time.

The Decision of the Michigan Supreme Court

When the case then proceeded to the Michigan Supreme Court, it held that the next of kin have no right to dispose of the remains of a deceased loved one, even after autopsy is complete and there is no further governmental need. *Waeschle v. Oakland County Medical Examiner*, Case No. 140263, which was decided on October 29, 2010. This holding offends the U.S. Constitution for all prospective cases, and defies federalism by overruling existing federal law, binding in that Circuit, which held that next of kin have a federally protected constitutional right to disposition of the remains of deceased loved ones.

REASONS FOR GRANTING THE PETITION

1. The right to disposition of the remains of a deceased loved one is constitutionally fundamental in a civilized society and cannot be abolished by the states.

Certain rights attach to human beings which the Framers did not include in the Constitution. These

rights are so basic they are understood to exist, without enumeration.

The U.S. Supreme court has defined such right in a number of areas, but the most basic are the ones dealing with the human condition of bodily integrity. From the Court's seminal holdings in *Griswold v. Connecticut,* 379 U.S. 926, 85 S.Ct. 328 (1964), *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205 (1952), and the infamous abortion cases, the nature of rights understood to exist has arisen from those concepts.

Each of the rights defined in those cases dealt with conditions during a person's life and body. The present case asks if the principal extends after death?

It is respectfully submitted that the right to dispose of the remains of a deceased loved one is of the same, fundamental character. It does not arise from permission by the state. It does not depend on the whim of the sovereign.

Taking the issue at its obvious scope, may the state demand the body parts of the dead within its borders for organ donation? For medical research? For any of a number of purposes which, facially, seem rational?

The Supreme Court has not allowed the government to act on matters involving fundamental rights merely because the state has a facially logical reason for its actions. When a right is fundamental, the state must show more than just rational want or need.

The action of the Michigan Supreme court of holding that the next of kin have no right of disposition

of the remains of their loved ones, at a point when it is admitted that the government has no interest in those remains, let alone a compelling state interest, violates the fundamental rights of the next of kin secured by the U.S. Constitution.

The Writ should be granted for these reasons, because a State retroactively "re-defining" property in an effort to circumvent a Federal circuit court ruling is a very serious problem. And the instant case is not the first time a state has used this tactic.

In *Albrecht v. Treon*, 118 Ohio St. 3d 348 (Ohio 2008), the Ohio Supreme Court absolved itself from liability by ignoring the rule of federal law set forth in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). In *Albrecht*, the state of Ohio declared, **retroactively**, that next of kin have no right to dispose of their loved one's remains (directly contrary to *Brotherton*). This ruling was issued in the context of a threat by the defendant government officials that allowing the case to go forward will 'cost the government nearly $90 Million Dollars.' Now, the Michigan Supreme court has done the same thing.

As the Second Circuit noted in *Turpin v. Mailet*, 579 F.2d 152, 165 (2d Cir. 1978) "fiscal considerations alone cannot stand in the way of the vindication of constitutional rights." See also *W. Tenn. Chptr. of Assoc. Builders & Contrs., Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1028 (W.D. Tenn. 2000) ("considerations of the City's financial health and administrative efficiency cannot run roughshod over plaintiff's constitutional rights").

This off-ramp from the federal constitution should be closed. Certiorari should be granted.

2. Where it has previously been decided as the law of the Circuit that certain conduct is a violation of the federal Constitution, fundamental principles of federalism prevent a federal court from certifying a question to the state supreme court about the legality of that conduct.

This Court has noted that through the certification of dispositive questions of state law to a state supreme court "a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'" *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997). Cases where certification may be appropriate include those such as *Arizonans for Official English*, where the issue was the interpretation of the Arizona Constitution. Similarly, certification may be appropriate where the construction of particular state statutes is at issue; e.g. *Bellotti v. Baird*, 428 U.S. 132, 146-148 (1976), where this Court noted that construction by the state court is appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" But neither situation is presented in this case.

This case does not involve the interpretation or construction of a particular state statute or state constitutional provision. This case involves the evaluation of rules and understandings—a *bundle* of rights—in the context of the Fourteenth Amendment

which the Federal courts had already determined. So, in this case the fundamental principles of federalism cut the other way, and preclude the Michigan Supreme Court from, *sub silentio,* overruling the Sixth Circuit.

In this case the Sixth Circuit has already determined that the conduct complained of by petitioner is a violation of the federal constitution. That determination is the law of the Sixth Circuit and, if federalism and precedent have any meaning, it is federal law which must be followed by those within the Circuit. In *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs* the Sixth Circuit examined Michigan law and determined that the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. In reaching that conclusion the Sixth Circuit specifically held that "Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative." *Whaley v. Cnty. of Tuscola ex rel. Tuscola Cnty. Bd. of Comm'rs,* 58 F.3d at 1116.

The *Whaley* court noted, citing this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) that "[t]he existence of a property interest for due process purposes depends in large part on state law." 58 F.3d at 1113-1114. The *Whaley* court also noted, however, citing *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) that "'property' interests subject to procedural due process are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Id.* Finally, the *Whaley* court explained that "whether a substantive interest created by the state rises to the level of a constitutionally

protected property interest is a question of federal constitutional law," and noted that "[i]n making this determination, courts must look beyond the law's nomenclature and to its substance." *Id.*

The *Whaley* court's conclusion was thus the result of a two step analysis: 1) is there a property interest; and 2) does the interest rise to the level of a constitutionally protected interest. Notwithstanding the potential advantages that certification of state law questions may present in some cases, it was perfectly appropriate for the Sixth Circuit in *Whaley* to make its own determination of Michigan law. As this Court noted in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) "it is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it * * * ." Similarly, in *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) this Court noted that "[i]t is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision." In *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 (1991), this court observed that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified" and that "the very essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." And as this Court explained in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 359 (1910), "[t]he Federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws." See also, by way of analogy, *Howlett v. Rose*,

496 U.S. 356, 366, n. 14 (1990) where this Court noted that "we have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law."

Not only was it permissible for the Sixth Circuit to make the determination of Michigan law in *Whaley*, it was particularly appropriate for the Sixth Circuit to ascertain the contours of Michigan law in that case because the federal constitutional question of whether there was a constitutionally protected property interest in *Whaley* did not involve the construction of a particular state statute or a particular constitutional provision but instead focused on the "substantive nature of the interest created by the state."

As this court noted in *United States v. Craft*, 535 U.S. 274, 278 (2002), property in the constitutional sense is often thought of as "a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." In evaluating this "bundle," as the *Whaley* court properly noted, "'property' interests subject to procedural due process are not limited by a few rigid, technical forms" and "courts must look beyond the law's nomenclature and to its substance." Thus, properly conducted, this determination, involves the evaluation of "a broad range of interests that are secured by 'existing rules or understandings.'"

Although the property interest may "depend[] in large part on state law," as this Court noted in *Board of Regents v. Roth, supra,* there is a marked difference between what the states consider to be property,

compared to what is "property" protected by the federal Constitution. This court in *United States v. Craft, supra*, recognized this distinction when it explained that

> In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property * * * . (Emphasis added.)

Since this Court has instructed that "state law labels are irrelevant to the federal question of which bundles of rights constitute property" and that the federal court must be careful of not focusing on the labels the states give these rights or the conclusions the states draw from them, the federal court is competent to objectively make this evaluation.

In this case, the Sixth Circuit did just that and made that evaluation of Michigan law, and concluded that under Michigan law there is a property interest in the remains of a deceased loved protected by the Fourteenth Amendment. For the Michigan Supreme Court to now hold the opposite is for that state court to overrule the law of the Sixth Circuit. Such an approach seriously violates the fundamental principles of federalism.

Federalism is often viewed from the perspective of the states—"there is a 'special deference owed to state law and state courts in our system of federalism * * *.'" *Thomas v. Am. Home Prods.*, 519 U.S. 913, 917 (1996), Rehnquist, C.J., dissenting. But, as the court

recognized in *Ark. Chronicle v. Easley*, 321 F. Supp. 2d 776, 790-791 (E.D. Va. 2004) rev'd on other grounds, *Ark. Chronicle v. Murphy*, 183 Fed. Appx. 300 (4th Cir. 2006), "federalism is a two-way street founded upon mutual respect between federal and state courts."

As Justice Kennedy explained in his concurring opinion in *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995)

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. (Emphasis added.)

It is the "each protected from incursion by the other" aspect which is operative here, because with regard to federal rights, as noted by this Court in *Dennis v. Higgins*, 498 U.S. 439, 450 (1991), the Supremacy Clause ""secure[s]' federal rights by according them priority whenever they come in conflict with state law.'" In *Howlett v. Rose*, 496 U.S. at 371 this Court explained that "the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." The Supremacy clause, as the court in *Legal Envtl. Assistance Found. v. Pegues*, 904 F.2d 640, 643-644 (11th Cir. 1990) noted, "states a fundamental structural principle of federalism."

The Sixth Circuit's directive to certify the question to the Michigan Supreme Court opened the door for

the Michigan Supreme Court to "dissociate themselves from federal law" and make its own determination about whether Michigan state agencies are complying with federal law. What kind of mischief does that breed? The invitation to a state court to decide if the agencies of its own state are in compliance with ***federal*** law—against prior federal Circuit decisions clearly holding they are not—is a play to economics not law, and that is not the way our system works.

The ruling in *Whaley* determined the existence of the state law interest—which the court has the right to do—and then held that under federal law, a federal right was being violated. It is clearly the province of that federal circuit court to decide that important point of federal law. As this Court long ago held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." See also, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) ("federal courts are the final arbiters of federal law"); *Blount v. Sterling Healthcare Group*, 934 F. Supp. 1365, 1374 (S.D. Fla. 1996) ("it is the job of federal courts to be the 'final arbiter(s) of federal law, a role which cannot be usurped by the state courts'"). And of course, among federal courts, this Court is the ultimate final arbiter of federal law. *Danforth v. Minnesota*, 552 U.S. 264 (2008), Roberts. C.J., dissenting; *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 876 (N.D. Ohio, 1999) ("[t]he Supreme Court alone is the final arbiter of the inevitable conflicts that arise when these two court systems construe the same law").

With respect to the issue at hand, the court in *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 804 (5th Cir. 1993) explained that "general principles of

federalism, * * * do not permit states to be final arbiters of their compliance with federal law." This Court reached a similar conclusion in *Howlett v. Rose*, 496 U.S. at 366 when it observed that a state court's construction of immunity "raise[d] the concern that the state court may be evading federal law and discriminating against federal causes of action."

What is happening in this case? The federal panel sought to allow the state to overcome a federal constitutional violation by the expedient of the state court "announcing" that the right at issue never existed. But as Justice Stevens more pointedly put it in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 295-297 (1967) "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." That is exactly what the Sixth Circuit allowed the Michigan Supreme court to do.

Does a Michigan court have the right to declare that the law does not in fact afford a protected interest in the remains of loved ones? That is doubtful. But even if it could, is it permitted to so retroactively, and thereby overrule federal precedent which held that such rights exist, for transactions which already occurred? Certainly not. When a federal court exercises its right to determine state law, makes that determination and on that basis announces a federal right and duty, that rule of law stands and must be followed. A subsequent decision finding the state right to be different, or even not to exist at all, at best allows a reexamination of the federal right which springs from it as to future players. It does not change the

rules for those who already ran the race under the extant rule announced by the Circuit.

Here, the Sixth Circuit made a state law determination that Michigan law recognized a property interest in next of kin to the remains of loved ones. The Circuit then made a federal, constitutional determination that this right rose to the level of a "legitimate claim of entitlement" protected by the due process clause. That was the federal law of the Sixth Circuit, and was the law of the Sixth Circuit at the time petitioner's rights were violated.

In this subsequent case, fourteen years after *Whaley*, and years after petitioner's rights thereunder were violated, the Sixth Circuit panel did nothing less than present the Michigan Supreme Court with the opportunity to retroactively insulate its medical examiners from liability for violating a right which the Sixth Circuit determined to be Constitutionally protected. The panel may not do so, because such a result would be contrary to the fundamental structure and principles of federalism. The Michigan Supreme Court could not do so. This Court should grant petitioner's petition for a Writ of Certiorari.

3. While a state supreme court can prospectively change its interpretation and application of state law, which may prospectively change the analysis of a federal constitutional question dealing with due process and property rights, a state court may not retroactively change its law and thereby eliminate vested federal Constitutional rights.

Simply put, a state court may not retroactively overrule a federal court. See, e.g. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750-751 (1995) (holding that the Ohio Supreme Court violated the Supremacy Clause when it decided not to retroactively apply this Court's decision that an Ohio tolling provision violated the commerce clause). The concept of federalism does not limit a state court from making determinations of its own state laws, or even of federal laws properly within its jurisdiction. It does prevent the state court, however, from making a pronouncement which would interfere with, undermine, or eliminate an accrued cause of action under a decision of federal law, even when that federal decision is predicated on underlying state rights.

The determination by the *Whaley* court that the next of kin of a deceased loved one in Michigan had of a "legitimate claim of entitlement" protected by the due process clause was the law which governed the defendants' conduct during the time period relevant to petitioner's action. The effect of the *Whaley* holding was two-fold: it gave the petitioner existing rights to certain federal procedural protections, and it placed an obligation on the defendants not to violate those rights. With regard to the conduct of defendants in this case,

Whaley "clearly established" that family members have an interest in the remains of their loved ones which is protected by the United States Constitution. Thus, defendants were prohibited from denying petitioner her rights without appropriate due process. *Whaley* was the law of the Circuit at the time defendants committed the acts complained of in this action. Defendants were not at liberty to ignore their obligations to petitioner under *Whaley* in the hope that the Michigan Supreme Court would eventually change the law.

The purpose of law is to create an ordered and predictable society and relationship between peoples. Predictability and order are lost if there is an ability to change the rules after the game is over. Put another way, where a rule of law is made public for people to know and follow, it is expected that they will do so even if that rule of law may possibly be subject to change, or even complete repeal, at some future time. To allow the public, or in this case the state, to disregard announced rules of law and court decisions simply because they may change in the future would result in anarchy.[3] Defendants' conduct for the period relevant to this action was governed by *Whaley* and that conduct violated petitioner's existing and clearly established rights.

---

[3] A key exception to this rule is where a subsequent decision declares that the existing rule of law was unconstitutional. In that circumstance, the determination of unconstitutionality is retroactive because an unconstitutional law is not a bad law. It never was the law. This exception is not raised by the present matter because there has been no determination of unconstitutionality here.

This issue does not involve the general federal rule of retroactivity as set forth by this Court in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Any decision by the Michigan Supreme Court would neither be a decision by a federal court, let alone by "this Court," nor would it be an interpretation of federal law, let alone a controlling interpretation of federal law.

This issue does not even involve Michigan's rules regarding the prospective or retrospective application of its decisions; though the Michigan Supreme Court has held that "[a]lthough the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v. City of Allen Park*, 465 Mich. 675, 696 (2002) (citation omitted). As this Court observed in *Bouie v. Columbia*, 378 U.S. 347, 354 (1964), "a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment." The issue is thus not the prospective or retrospective application of any decision as to Michigan law which the Michigan Supreme Court might render, it is rather whether such a decision can change the status of state law as of a given moment in the past. Under the facts of this case, that is an issue of federalism.

The Sixth Circuit in *Whaley* made a determination of what the "rules and understandings" were in Michigan with regard to the next of kin's interest in the remains of their deceased loved ones. As discussed in the previous section, it was particularly appropriate for the federal court to make this determination since it did not involve the interpretation of a particular state statute or state constitutional provision but rather the evaluation of a "bundle" of rights in the light of federal law. And in the evaluation of that bundle in light of federal law the labels and conclusions of the state courts with regard to those rights are irrelevant. *United States v. Craft, supra.*

Once *Whaley* was decided it became the law of the Sixth Circuit, and was the law of the Sixth Circuit at the time that defendants retained and destroyed Katherine Weins' brain. *Whaley* articulated what Michigan law was in the Sixth Circuit for federal due process purposes at a particular point of time in the past—the point in time when petitioner's cause of action accrued. The Michigan Supreme Court simply cannot now overrule the Sixth Circuit with regard to the Sixth Circuit's determination of what the status of state law as of a given moment in the past was, and thereby extinguish an accrued cause of action.

In *Richards v. Jefferson Cnty.*, 517 U.S. 793, 804 (1996), citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-682 (1930) this court explained that "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." And under *Whaley* petitioner had a right. In *Bouie*

v. Columbia, supra, this Court noted that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'"

Allowing the Michigan Supreme Court the opportunity to determine not just what the law *is* in Michigan with regard to the rights of the next of kin in the remains of their deceased loved ones but what the law *was* at a point of time in the past, a point in time when the Sixth Circuit had already determined that the next of kin in Michigan had an interest protected by the Fourteenth Amendment, has the same result. Such a determination deprives petitioner of her right to defend her substantive freedoms as articulated by the Sixth Circuit in the U.S. Constitution. That result also offends the fundamental structure and principles of federalism.

The Constitution never envisioned the State courts to have the power to overrule the Federal Courts. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15, 417, 420 (1819). This Court should grant petitioner a Writ of Certiorari.

4. The right to bury a loved one is a fundamental right of liberty or religion which is protected by the U.S. Constitution.

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. At the threshold, a claim under § 1983 for an

unconstitutional deprivation of property must show (1) a deprivation (2) of property (3) under color of state law. See *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). If these elements are met, the question becomes whether the state afforded constitutionally adequate process for the deprivation. Id. at 537. Here, it is uncontested that the medical examiner's action was a deprivation under color of state law. The medical examiner argues, however, that the dismissal of the plaintiff's complaint was proper because she could not have a "legitimate claim of entitlement" in her mother's body, specifically her brain.

The Ninth Circuit court in *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002) stated it best:

> "Since Rochin v. California, 342 U.S. 165 (1952), the Supreme Court repeatedly has affirmed that "the right of every individual to the possession and control of his own person, free from all restraint or interference of others," Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891), is "so rooted in the traditions and conscience of our people," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), overruled in part, Malloy v. Hogan, 378 U.S. 1 (1964), as to be ranked as one of the fundamental liberties protected by the "substantive" component of the Due Process Clause. See Schmerber v. California, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."); Rochin, 342 U.S. at 174 (describing

> unauthorized physical invasions of the body as "offensive to human dignity"). This liberty, the Court has "strongly suggested," extends to the personal decisions about "how to best protect dignity and independence at the end of life." Washington v. Glucksberg, 521 U.S. 702, 716, 720 (1997); Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 302, 305 (Brennan, J. dissenting) (expressing the view that a right "to choose to die with dignity " flows from "[t]he right . . . to determine what shall be done with one's own body, [which] is deeply rooted in this Nation's traditions . . . and is securely grounded in the earliest common law").

This issue has grown more contentious as scientific advances make parts of the body highly desired for donation, transplant and research. As the Sixth Circuit recognized in *Brotherton v. Cleveland*, 923 F.2d 477, (6th Cir. 1991);

> The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. Note, *Toward the* [**13] *Right of Commerciality*, UCLA L. REV. 207, 219 (1986). The human body is a valuable resource. *See Moore v. Regents of the University of California, 51 Cal. 3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990)* (physician used patient's cells in potentially lucrative medical research without his permission). As biotechnology continues to

> develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded periods outside a live body is far from inconceivable.

The question however has never been addressed by the Supreme Court.

> The Court has not had occasion to address whether the rights of possession and control of one's own body, the most "sacred" and "carefully guarded" of all rights in the common law, Botsford, 141 U.S. at 251, are property interests protected by the Due Process Clause. Nor has it addressed what Due Process protections are applicable to the rights of next of kin to possess and control the bodies of their deceased relatives." (*Newman*, supra.)

The lack of any review of this issue by the Supreme Court is not surprising, since the family's right to "sepulcher" was always honored as sacrosanct.

Duties to protect the dignity of the human body after its death are deeply rooted in our nation's history. In a valuable history of the subject, the Supreme Court of Rhode Island [Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227 (R.I. 1872)] recounted:

> "A change in the common law in England can be traced to the 1840 case of Rex v. Stewart, 12 AD. & E. 773 (1840). In that case, the socially recognized right of the dead to a dignified disposition, previously enforced only through

> ecclesiastical courts, was interpreted as creating enforceable common law duties. . . .It stated the premises that, under longstanding tradition, "[e]very person . . . has a right to Christian burial. . .that implies the right to be carried from the place where his body lies to the parish cemetery". . .Id. at 777-78. From these traditional understandings, the court concluded that "[t]he feelings and interests of the living require" that "the common law cast [ ] on some one the duty of carrying to the grave, decently covered, the dead body."
>
> ". . .The duty to protect the body by providing a burial was often described as flowing from the "universal . . . right of sepulcher," rather than from a concept of property law. *Wynkoop v. Wynkoop*, 42 Pa. 293, 300-01 (1862). (*Newman*, supra.)

The actions of the government in the present case—taking and then destroying the remains of Petitioner's loved one—demonstrate that this respect has waned. The time has come for the Supreme Court to address this matter. Does the family have a fundamental right to bury their loved one? History gives a clear answer, but the court decisions do not.

In *You Yang Yang v. Sturner*, 728 F. Supp. 845 (D.R.I. 1990) the court found the parents had a viable claim under 42 U.S.C. 1983 where son's body was autopsied against the parents First Amendment religious beliefs and Fourteenth Amendment rights to due process and equal protection. The court cited: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high

appellation if the laws furnish no remedy for the violation of a vested legal right." (*Marbury v. Madison*, 5 U.S. 1 Cranch) 137, 163, 2 L.Ed. 60 (1803)).

In contrast, the Fifth Circuit found the parents had "not suffered a constitutional invasion of any property right pursuant to section 1983" when the county coroner conducted unauthorized medical experimentations on the bodies of their two deceased children. *Arnaud v. Odom*, 870 F.2d 304 (1989).

The Eighth Circuit in *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) while finding a common law quasi-property interest in the body, refused to find a constitutional violation when the coroner retained and destroyed body parts after autopsy.

But the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) held an Ohio wife does have a "legimate claim of entitlement" protected by the 14th Amendment in her deceased husband's body. The Sixth Circuit again recognized and affirmed that same Constitutional protection for the citizens of Michigan in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995).

The Circuits are split on this most basic, important issue. "There is perhaps nothing else so distinctive of the condition and character of a people as the method in which they treat their dead" (Tegg, W: *The Last Act: Being the Funeral Rites of Nations and Individuals*. London: William Tegg & Co, 1876, p. 9).

The dead have been formally buried for at least 200,000 years, beginning with Neanderthals. This is a right which could not be more human, more sacred

or more fundamental. It touches every single citizen of the United States.

But our record shows a collision between the government and citizens about this right which is older than this republic but which this Court has never addressed. Is sepulcher a fundamental right protected by the U.S. Constitution? Certiorari should be granted, and this question answered.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

John H. Metz, Esq.
Counsel of Record
1117 Edwards Road
Cincinnati, Ohio 45208
(513) 321-8844
(513) 321-6389 Fax
metzlegal@aol.com

Patrick J. Perotti, Esq.
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391
(440) 352-3469 Fax
pperotti@dworkenlaw.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, State of Michigan Supreme Court (October 29, 2010) 1a

Appendix B: Amended Opinion/Amended Judgment, United States Court of Appeals for the Sixth Circuit (August 14, 2009) 8a

Appendix C: Opinion/Judgment, United States Court of Appeals for the Sixth Circuit (July 22, 2009) 34a

Appendix D: Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, United States District Court Eastern District of Michigan, Southern Division (September 19, 2008) 59a

Appendix E: Order denying rehearing, Michigan Supreme Court (December 17, 2010) 79a

Appendix F: Order, United States Court of Appeals for the Sixth Circuit (October 23, 2009) 81a

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice:	Justices:
	Marilyn Kelly	Michael F. Cavanagh
		Maura D. Corrigan
		Robert P. Young, Jr.
		Stephen J. Markman
		Diane M. Hathaway
		Alton Thomas Davis

FILED OCTOBER 29, 2010

STATE OF MICHIGAN
SUPREME COURT

No. 140263

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Plaintiffs,

v

OAKLAND COUNTY MEDICAL EXAMINER and OAKLAND COUNTY,

Defendants.

BEFORE THE ENTIRE BENCH

PER CURIAM.

The United States District Court for the Eastern District of Michigan certified the following question to this Court pursuant to MCL 7.305(B):

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?[1]

We granted the request to answer the question.[2] Having heard the parties' oral arguments, and having reviewed the briefs filed by the parties and other interested amici curiae, we answer under the law applicable to this case and the facts as presented: No, assuming that a decedent's brain was removed by a medical examiner to conduct a lawful investigation

---

[1] See *Waeschle v Dragovic*, 576 F3d 539, 551 (CA 6, 2009).

[2] *In re Certified Question (Waeschle v Oakland Co Med Examiner)*, 485 Mich 1116 (2010).

into the decedent's cause of death, the decedent's next of kin does not have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination.

At all times relevant to the underlying federal district court case, this issue was governed by MCL 52.205(5).[3] This statute provided:

> The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives . . . except that the medical examiner may retain, as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime.

Because the statute required only prompt return of "the body"—and because it permitted the medical examiner to retain portions of the body in order to detect crime—this law provided next of kin no clear right to the return[4] of a brain lawfully removed and

---

[3] MCL 52.205 was originally enacted in 1953 by Public Act 181. A relative's statutory "right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body" under Michigan's Estates and Protected Individuals Code is expressly "[s]ubject to 1953 PA 181, MCL 52.201 to 52.216 . . . ." MCL 700.3206(1). In response to this case, the Legislature amended MCL 52.205, effective July 1, 2010. 2010 PA 108. MCL 52.205(6) now specifically addresses medical examiners' duties to next of kin under the circumstances presented here.

[4] Plaintiff here did not request return of the brain. We express no opinion concerning whether, before the 2010 amendment of MCL

retained for forensic examination after the body was returned to the decedent's family for burial or cremation. Further, plaintiff has not disputed defendants' assertions that there was an historical practice of retaining, examining, and later disposing of an examined brain when MCL 52.205 was enacted in 1953 and that medical examiners promulgated rules to permit this practice under MCL 52.201c.[5] Finally, no Michigan caselaw gives next of kin a possessory right to a decedent's brain following a lawful forensic examination.

Marilyn Kelly
Michael F. Cavanagh
Maura D. Corrigan
Stephen J. Markman
Diane M. Hathaway

52.205, a medical examiner would have had a duty to return a brain in response to a relative's timely request if the medical examiner had not destroyed the brain and had no further need to examine it. MCL 52.205(6) now expressly delineates a medical examiner's duties under such circumstances.

[5] MCL 52.201c was enacted by 1969 PA 92, effective July 24, 1969.

STATE OF MICHIGAN
SUPREME COURT

No. 140263

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN	)
KAREN WAESCHLE, individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v	)
OAKLAND COUNTY MEDICAL EXAMINER and OAKLAND COUNTY,	)
Defendants.	)

YOUNG, J. (*dissenting*).

I continue to adhere to my stated position in *In re Certified Question (Wayne Co v Philip Morris Inc)*, 622 NW2d 518 (Mich, 2001), that this Court lacks the authority under state law to answer certified questions. However, my position has failed to carry the day. See Proposed Amendment of MCR 7.305, 462 Mich 1208 (2000). While this Court has chosen to assert the right to exercise that authority, I will exercise careful discretion before answering any certified question.

In light of the recent amendment of the relevant statute by 2010 PA 108, this case now only concerns a putative class of persons whose arguable claims arose before the effective date of the amendment. Accordingly, the legal significance of the question certified by the United States District Court for the Eastern District of Michigan is considerably diminished. I would decline to answer the question in this instance.

Robert P. Young, Jr.

STATE OF MICHIGAN
SUPREME COURT

No. 140263

In re CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN	)
KAREN WAESCHLE, individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v	)
OAKLAND COUNTY MEDICAL EXAMINER and OAKLAND COUNTY,	)
Defendants.	)

DAVIS, J. (*dissenting*).

I would decline to answer the certified question because I am not persuaded that the Court should answer this certified question.

Alton Thomas Davis

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed August 14, 2009]

KAREN WAESCHLE, individually and on behalf of others similarly situated,
Plaintiff-Appellee,

v.

LJUBISA J. DRAGOVIC, individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 08-10393—Victoria A. Roberts, District Judge.

Argued: June 16, 2009

Decided and Filed: August 14, 2009

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.*

COUNSEL

ARGUED: William H. Horton, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellants. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, for Amici Curiae. **ON BRIEF:** William H. Horton, Elizabeth A. Favaro, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, Keith J. Lerminiaux, OAKLAND COUNTY CORPORATION COUNSEL, Pontiac, Michigan, for Appellants. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, John Henry Metz, LAW OFFICE, Cincinnati, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Daniel A. Ophoff, KENT COUNTY, Grand Rapids, Michigan, Joanne G. Swanson, KERR, RUSSELL AND WEBER, PLC, Detroit, Michigan, for Amici Curiae.

---

* The Honorable Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

AMENDED OPINION

RONALD LEE GILMAN, Circuit Judge. After Karen Waeschle's mother died, an autopsy was performed to determine the cause of death. When the mother's remains were returned to Waeschle for cremation, she was not informed that the brain had been removed during the autopsy and was still being studied by the Medical Examiner. Waeschle sued Oakland County and Ljubisa J. Dragovic, the Oakland County Medical Examiner (Dragovic or the Medical Examiner), after discovering that her mother's brain had been incinerated as medical waste once the autopsy was completed. The Medical Examiner, Waeschle maintains, violated the Due Process Clause of the Fourteenth Amendment by depriving her of the right to dispose of her mother's brain.

Oakland County and Dragovic filed for summary judgment, arguing that Waeschle had no constitutionally protected property right to possess her deceased mother's brain because it had been removed for forensic examination. Dragovic also asserted a qualified-immunity defense. In the alternative, the County and Dragovic requested that the district court certify to the Michigan Supreme Court the question of whether Michigan law gives Waeschle a property interest in her deceased mother's brain for the purpose of burial or cremation.

For the reasons set forth below, we **REVERSE** the portion of the district court's judgment denying Dragovic's qualified-immunity defense, and **REMAND**

the case with instructions to grant his motion for summary judgment with respect to Waeschle's individual-capacity claim against him. We also **REVERSE** the judgment of the district court denying Oakland County's and Dragovic's motion to certify the question of state law to the Michigan Supreme Court, and **REMAND** the case with instructions to certify the question and conduct such further proceedings as are necessary for the proper disposition of this case.

I. BACKGROUND

A. Factual background

Karen Waeschle's 88-year old mother, Katherine R. Weins, was a resident of a nursing home in West Bloomfield, Michigan. In August 2006, she fell and hit her head. Weins was taken to a hospital, where she died two weeks later. Waeschle suspected that abuse or neglect caused the fall. To investigate, the West Bloomfield Township Police Department requested that an autopsy be performed on Weins's body. Waeschle did not challenge the request.

Dr. Ruben Ortiz-Reyes was the Deputy Oakland County Medical Examiner who conducted the autopsy. This required Dr. Ortiz-Reyes to remove and examine various organs, including Weins's brain, for clues regarding the cause of her death. To examine a brain, it must be soaked in a formaldehyde-like solution until it becomes stiff enough to dissect. The soaking process normally takes 10 to 14 days. With the exception of the brain, the other organs that Dr. Ortiz-Reyes examined were placed back into the body.

When Weins's body (minus the brain) was made available to Waschle, the latter cremated the remains. Waeschle disposed of her mother's body without knowing that the brain was not included. The Medical Examiner failed to notify Waeschle that her mother's body was being returned without the brain or that the Medical Examiner planned to incinerate it once the examination of that organ was completed.

Several months later, after disposing of her mother's body, Waeschle met with the Deputy Medical Examiner and was provided a copy of the autopsy report. At that time, Waeschle learned that her mother's brain had been incinerated as medical waste without her consent. This litigation followed.

B. Procedural background

As amended, Waeschle's complaint alleged that the Medical Examiner violated Waeschle's Fourteenth Amendment right to due process by not returning her mother's brain for disposal after the autopsy of that organ was completed. Waeschle also claimed that Dragovic negligently and intentionally inflicted emotional distress on her in violation of state law. In June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. He also filed a motion to dismiss the state-law causes of action. In the alternative, Dragovic urged the district court to certify the state-law issues to the Michigan Supreme Court.

The district court dismissed the state-law claims. As for the due process claim, the court found that Waeschle had established that (1) she had a

quasi-property interest in her mother's brain that was protected under the United States Constitution, and (2) the Medical Examiner deprived her of that interest while acting under color of state law. The court also found that Dragovic was not entitled to qualified immunity because the quasi-property interest was "clearly established" and because the Medical Examiner "reasonably should have known" that he was violating Waeschle's Fourteenth Amendment right.

II. ANALYSIS

A. Standard of review

This appeal involves the denial of a qualified-immunity claim, which was set forth in Dragovic's motion for summary judgment. "We review a district court's denial of qualified immunity de novo." *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

B. Section 1983 and the qualified-immunity framework

Section 1983 serves as a vehicle to obtain damages caused by persons acting under color of state law whose conduct violates the U.S. Constitution or federal laws. *McQueen v. Beecher Comty. Schs.*, 433 F.3d 460, 463 (6th Cir. 2006). "A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity." *Drogosch v. Metcalf*, 557 F.3d 372, 377 (6th Cir. 2009). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816 (citations omitted). And

> if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's

> conduct violated a clearly established constitutional right.

Id. (citation omitted).

In *Pearson*, however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that

> [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.

Id.

Our qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established.

C. Clearly established constitutional rights

The "clearly established" prong of the two-step *Saucier* analysis is particularly important for the present case. This court has clarified that

> [f]or a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's

> conduct must be apparent in light of pre-existing law.

Durham v. Nu'Man, 97 F.3d 862, 866 (6th Cir. 1996). "A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred." *Id.*

Waeschle complains that Dragovic violated her right to dispose of her mother's brain when he did not give her the opportunity to recover it for the purpose of burial or cremation. But whether Waeschle has this right under state law is far from clear. Before explaining why, we will set forth the framework governing the analysis of procedural due process claims to provide further context for the claim at stake in this appeal.

1. Due process framework

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (citation omitted).

This appeal concerns the question of whether Waeschle has a constitutionally protected property interest under the first element listed above. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (internal quotation marks omitted)).

Although property rights are principally created by state law, "whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. 1995). "Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. The due process clause only protects those interests to which one has a legitimate claim of entitlement." *Brotherton v. City of Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citations and internal quotation marks omitted). In the next subsection, we address the issue of whether Dragovic deprived Waeschle of a clearly established, constitutionally protected property right to her mother's brain without due process of law.

2. *White's claimed property right is not clearly established*

Waeschle cites two cases from this court in support of her claim that she has a clearly established property right to her mother's brain: *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of*

Tuscola, 58 F.3d 1111, 1117 (6th Cir. 1995). Each of these cases involves the removal of corneas from dead bodies without the authorization of the decedent's next of kin. Because the court in *Whaley* considered itself bound by *Brotherton*, we will discuss the cases in chronological order.

In *Brotherton*, the plaintiff's husband was discovered in his car without a pulse. He was taken to a hospital in Cincinnati, Ohio, where he was declared dead on arrival. The plaintiff declined to donate her husband's organs. Because the death might have been a suicide, the hospital transferred the body to the county coroner's office for an autopsy. After the autopsy was completed, the coroner permitted the removal of the decedent's corneas for storage in an eye bank. The hospital had failed to inform the coroner that the plaintiff did not want her husband's body parts removed for donation. Nor did the coroner ask whether there were any such objections before allowing the removal of the corneas. In fact, an Ohio statute "permitted a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body." *Brotherton*, 923 F.2d at 478 (citing Ohio Rev. Code § 2108.60).

The plaintiff in *Brotherton* sued the county coroner under 42 U.S.C. § 1983, alleging that she was deprived of her property rights in violation of the Due Process Clause because her husband's corneas had been removed without her consent. *Id.* at 478-79. Although the district court dismissed the complaint for failing to state a claim, this court reversed, holding that "the

aggregate of rights granted by the state of Ohio to [the plaintiff] rises to the level of a legitimate claim of entitlement in [the decedent's] body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.* at 482 (internal quotation marks omitted).

In reaching this conclusion, the *Brotherton* court impliedly conceded that the widow's rights to her husband's dead body were quite limited. The court acknowledged, for example, that Ohio courts had expressly declined to recognize that the next of kin have vested property rights in the bodies of their deceased relatives. *Id.* at 480 (citing *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35 (Ohio Ct. App. 1986)). On the other hand, the court noted that "property" is traditionally conceptualized as a bundle of rights, including "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.* at 481. Moreover, there was little doubt that Ohio law afforded the next of kin at least some of these rights with respect to their relative's body. *See id.*

The court in *Brotherton* emphasized that the plaintiff had the right under Ohio law to possess her husband's body for the limited purpose of conducting a burial or other lawful disposition. *Id.* at 482. Another right of the next of kin is to make an anatomical gift of their relatives' organs. *See id.* at 478 ("The hospital asked [the plaintiff] to consider making an anatomical gift; she declined . . . ."). *Brotherton* concluded that these limited rights, even though they were not labeled property rights by the Ohio courts, formed the basis of a constitutionally protected property interest in the decedent's body, including the corneas. *Id.*

Whaley involved similar facts. Two Michigan counties hired a pathologist to conduct autopsies on a contractual basis. The counties entered into an agreement pursuant to which the pathologist's assistant was allowed to remove a decedent's corneas without the consent of the next of kin. In return, the pathologist's assistant, who stood to profit from selling the corneas, agreed to bear "all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not." *Whaley*, 58 F.3d at 1113.

Once this cornea-removal practice was discovered, a class of plaintiffs sued the counties, alleging that "they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedents' eyeballs or corneas." *Id.* The district court dismissed their complaint after concluding that Michigan law did not create rights that qualified as constitutionally protected property interests under the Due Process Clause. *Id.*

Just as in *Brotherton*, however, this court reversed the district court's judgment, holding that "the next-of-kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes." *Id.* at 1117. The court reasoned that it was bound by *Brotherton* because Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Id.* at 1114. One such right is that of the next of kin "to possess the body for burial and prevent its mutilation." *Id.* This right was inferred from several Michigan Supreme Court cases recognizing a cause of action for the unlawful mutilation of a corpse. *See id.* (citing, for example, *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956)

("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body.")) The next of kin also have the right to choose whether to make "a gift of all or part of the decedent's body, at least when there is no contrary intent evidenced by the decedent." *Whaley*, 58 F.3d at 1116. In sum, the court concluded that

> the next of kin have the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation. Applying *Brotherton*, we therefore hold that Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative.

Id.

Waeschle contends that the same basic reasoning found in *Brotherton* and *Whaley* controls this appeal. Her argument is, in essence, that her mother's brain is no less constitutionally protected than are eyes or corneas. She also contends that the cornea cases serve to satisfy the second prong of *Saucier*'s qualified-immunity analysis because they allegedly demonstrate that the right to her mother's brain was clearly established.

Brotherton and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in

Brotherton and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

A pair of cases decided in the Southern District of Ohio on this very issue illustrate the conflicting viewpoints. The first case, *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704, at *4-5 (S.D. Ohio Sept. 28, 2005), supports Waeschle's position. In *Hainey*, the plaintiffs brought a class-action lawsuit after learning, as Waeschle did, that they had buried their loved ones' bodies without the brains because the latter had been removed during autopsy and retained for further study. The Ohio coroner moved for, and the district court denied, summary judgment on the basis of qualified immunity.

According to the district court in *Hainey*, the plaintiffs had a legitimate claim of entitlement to the decedents' brains in light of *Brotherton*. *Brotherton*'s holding, the court continued, broadly included "the right to take possession of what remains of the deceased's body following the completion of the autopsy." *Hainey*, 2005 WL 2397704, at *6. The court further concluded that "*Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment." *Id.* at *8. This purportedly clear ruling, furthermore, rendered the coroner ineligible for qualified immunity because "a reasonable coroner in this judicial circuit would have known that disposing of body parts without notice to the decedent's next of kin would have violated that right." *Id.*

Hainey therefore supports Waeschle's claim. But subsequent caselaw in Ohio reaches the opposite conclusion. The same district court, in *Albrecht v. Treon*, No. 1:06-cv-274, 2007 WL 777864, at *1 (S.D. Ohio March 12, 2007) (*Albrecht I*), considered a virtually identical fact pattern as the one addressed in *Hainey*. A lawsuit was filed against the coroner of Clermont County, Ohio after the plaintiffs discovered that the coroner "had removed their son's brain for forensic examination and retained it after the autopsy." *Albrecht I*, 2007 WL 777864, at *1. In response, the coroner argued that the court in *Hainey* had misinterpreted applicable Ohio law. *Id.* The coroner requested that the district court certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at *2.

Acknowledging that Ohio law affords the next of kin a custodial right in the body of the decedent, the district court nevertheless concluded that the right does not "automatically confer to the next of kin a protected right in 'body parts' of a decedent removed and retained by the coroner for forensic examination and testing." *Id.* at *5. The court emphasized that an Ohio statute appeared to severely restrict the rights of the next of kin to body parts or tissues collected during the course of an autopsy. *Id.* (citing Ohio Rev. Code § 313.123(B)(1) (2006) , which provides that "retained

tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws").

Indeed, there was only one exception to this medical-waste disposal requirement, triggered by religious considerations. *Id.* (citing Ohio Rev. Code § 313.123(B)(2), which states that the coroner must return specimens to the person who has the right to the disposition of the body if "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs."). Despite this statute's provision stating that autopsy specimens are to be treated as medical waste, the district court granted the coroner's request to certify the issue to the Ohio Supreme Court after concluding that none of the existing Ohio authorities resolved the precise issue of whether the next of kin had a right to dispose of body parts that had been collected during an autopsy. *Albrecht I*, 2007 WL 777864, at *5–6.

The Ohio Supreme Court accepted the certified question for review and repudiated the plaintiffs' position, holding that "the next of kin of a decedent upon whom an autopsy has been performed *do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.*" *Albrecht v. Treon*, 889 N.E.2d 120, 122 (Ohio 2008) (*Albrecht II*) (emphasis added). In reaching this conclusion, the court distinguished *Brotherton*, reasoning that "*Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case." *Id.* at 124. The corneas in *Brotherton* were

extracted pursuant to an Ohio statute that permitted their removal even when doing so was not necessary to conduct a forensic examination. 923 F.2d at 478-79. Different interests are at stake, according to the Ohio Supreme Court, when tissue is taken for lawful investigative purposes:

> [A] deceased's next of kin *had no protected right in autopsy specimens pursuant to Ohio statutes*. The Ohio Revised Code authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary. A coroner's forensic examination is a classic function of the police power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time.

Albrecht II, 889 N.E.2d at 126-27 (citation omitted) (emphasis added).

Furthermore, the Ohio Supreme Court noted that its conclusion did not depend on the existence of the 2006 statute that designated autopsy specimens as medical waste. *Id.* at 126 (holding that "[e]ven before [Ohio Rev. Code § 313.123(B)] was enacted, a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes"). *Albrecht II* clearly raises a question as to the scope of the quasi-property right at issue in both *Brotherton* and *Whaley* where forensic specimens are collected in the course of criminal investigations (as in the present case).

Waeschle's property rights, of course, are not defined by Ohio law. But *Whaley* observed that Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Whaley*, 58 F.3d at 1115. The Ohio Supreme Court's decision in *Albrecht II* is therefore relevant in assessing whether the same right is clearly established under Michigan law. And the Court's decision in *Albrecht II*, which explicitly denied that the next of kin have a right to body parts collected for forensic examination, suggests that such a right would probably not be recognized under existing Michigan law.

But our analysis is not based exclusively on the analogy to cases construing Ohio law. Instead, our independent review of Michigan law fails to establish an unequivocal post-autopsy right to specimens taken for the purpose of a lawful criminal investigation. One of the cases from the Michigan Supreme Court cited by Waeschle recognizes a cause of action for the unlawful and intentional mutilation of dead bodies. *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body."). Another recognizes the next of kin's right to control a relative's body for the limited purpose of securing a burial. *Doxtator v. Chicago & W.M. Ry. Co.*, 79 N.W. 922, 922 (Mich. 1899) (recognizing that, although there was "no property in a dead body [at common law], . . . the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere

with that right by withholding the body or mutilating it in any way").

But these cases, as well as others cited by Waeschle, fail to address the question of body parts retained for forensic examination. *See Keyes v. Konkel*,78 N.W. 649, 649 (Mich. 1899) (observing that various state courts have considered dead bodies to be "quasi property," and recognizing a tort for infringing on a next of kin's right to have an unmutilated dead body delivered for burial); *Dampier v. Grace Hosp. Corp.*, 592 N.W.2d 809 (Mich. Ct. App. 1999) (addressing causes of action available against coroners who allowed the decomposition of a dead body in their possession); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) ("While there is no property right in the next of kin to a dead body, . . . Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body . . . ."). None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

Nor does Waeschle identify any Michigan statute that unambiguously sets forth a Medical Examiner's duties regarding how he or she should dispose of particular body parts collected for the purposes of an autopsy. One statute authorizes Medical Examiners to retain, "as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime." Mich. Comp. Laws § 52.205 (emphasis added). The same statute instructs Medical Examiners to "promptly deliver or return *the body* to relatives or representatives of the

deceased." *Id.* (emphasis added). Another statute cited by Waeschle simply describes the right of the next of kin to make decisions regarding, for example, funeral arrangements. *See id.* § 700.3206(1).

Waeschle argues that the above provisions create the right to a prompt return of her mother's brain after the Medical Examiner had completed the autopsy. But the statutory language does not specify whether each and every body part or specimen collected during the course of an autopsy must be returned to the next of kin on a piecemeal basis. Such a requirement might prove totally impracticable.

In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal. Not a single case instructed Dragovic to treat the brain in any manner other than the way he did. Nor did any Michigan statute unambiguously instruct Dragovic on how to dispose of individual body parts retained for forensic examination as opposed to dealing with the body as a whole.

Waeschle's alleged constitutionally protected property right to her mother's brain is therefore not clearly established because the underlying state-created property interest is not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Drogosch v. Metcalf*, 557 F.3d 372, 379 (6th Cir. 2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For that reason, Dragovic is entitled to summary judgment on the basis of qualified immunity. *See Drogosch*, 557 F.3d at 379.

To avoid any misunderstanding, we wish to clarify the limits of this holding. There is nothing in the preceding analysis that is intended to suggest that Michigan law clearly establishes that the next of kin have *no* quasi-property interest in body parts collected during the course of an autopsy for forensic examination. Nor is the discussion meant to foreclose the possibility that, if Michigan establishes such a right in the future, the interest would rise to the level of a constitutionally protected property right under the Fourteenth Amendment. In light of *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), however, we are under no obligation to determine the existence or the scope of Waeschle's right to her mother's brain in the present case.

We also wish to acknowledge that Waeschle's shock in learning that her mother's brain was incinerated as medical waste is understandable. And the possibility exists that Michigan might in the future decide to recognize a right to recover organs that were originally retained as part of a lawful criminal investigation. Such a right would also presumably have to distinguish between major body parts (to which individuals like Waeschle would have a right to possess for the purpose of burial or cremation) and insignificant tissue samples (to which no such right would attach). But Michigan law as presently developed does not clearly recognize that such a custodial right to body parts exists. And whether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualified-immunity test as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).

D. Oakland County and official-capacity claim

Although the preceding qualified-immunity analysis shields Dragovic from Waeschle's individual-capacity claim, we have declined to evaluate the merits of Waeschle's due process claim because we are uncertain as to whether Michigan law gives Waeschle a property interest in her deceased mother's brain that is constitutionally protected. Waeschle's due process claim against Dragovic in his official capacity and against Oakland County is therefore still pending.

We have already explained that the merits of Waeschle's constitutional claim depend primarily on whether, under Michigan law, she had a property interest in her deceased mother's brain. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (explaining that the question of whether a constitutionally protected property interest exists is often a question of state law). Specifically, Waeschle's due process claim turns on the answer to the following state-law question:

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

Given our view that the Michigan courts are better suited to answer the unsettled state-law aspect of Waeschle's due process claim than we are, we will

exercise our discretion to have the district court certify the above-stated issue to the Michigan Supreme Court. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (explaining that certification to a state's highest court is proper "when the question is new and state law is unsettled") (citations omitted); *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994) (observing that certification is appropriate "where an important question of state law has arisen solely in federal court"); Mich. Ct. R. § 7.305(B)(1) (permitting the Michigan Supreme Court to address questions of Michigan law that have been certified by a federal court).

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the portion of the district court's judgment denying Dragovic's qualified-immunity defense, and **REMAND** the case with instructions to grant his motion for summary judgment with respect to Waeschle's individual-capacity claim against him. We also **REVERSE** the judgment of the district court denying Oakland County's and Dragovic's motion to certify the question of state law to the Michigan Supreme Court, and **REMAND** the case with instructions to certify the question and conduct such further proceedings as are necessary for the proper disposition of this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed August 14, 2009]

KAREN WAESCHLE, individually and on behalf of others similarly situated, Plaintiff-Appellee,	)
v.	)
LJUBISA J. DRAGOVIC, individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation, Defendants-Appellants.	)

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed July 22, 2009]

KAREN WAESCHLE,
Plaintiff-Appellee,

v.

LJUBISA J. DRAGOVIC,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 08-10393—Victoria A. Roberts, District Judge.

Argued: June 16, 2009

Decided and Filed: July 22, 2009

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.*

COUNSEL

ARGUED: William H. Horton, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellant. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, for Amici Curiae. **ON BRIEF:** William H. Horton, Elizabeth A. Favaro, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, Keith J. Lerminiaux, OAKLAND COUNTY CORPORATION COUNSEL, Pontiac, Michigan, for Appellant. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, John Henry Metz, LAW OFFICE, Cincinnati, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Daniel A. Ophoff, KENT COUNTY ADMINISTRATORS OFFICE, Grand Rapids, Michigan, Joanne G. Swanson, KERR, RUSSELL AND WEBER, PLC, Detroit, Michigan, for Amici Curiae.

* The Honorable Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. After Karen Waeschle's mother died, an autopsy was performed to determine the cause of death. When the mother's remains were returned to Waeschle for cremation, she was not informed that the brain had been removed during the autopsy and was still being studied by the Medical Examiner. Waeschle sued Ljubisa J. Dragovic, the Oakland County Medical Examiner (Dragovic or the Medical Examiner), after discovering that her mother's brain had been incinerated as medical waste once the autopsy was completed. The Medical Examiner, Waeschle maintains, violated the Due Process Clause of the Fourteenth Amendment by depriving her of the right to dispose of her mother's brain.

Dragovic filed for summary judgment, asserting a qualified-immunity defense, which the district court denied. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to **GRANT** Dragovic's motion for summary judgment.

I. BACKGROUND

A. Factual background

Karen Waeschle's 88-year old mother, Katherine R. Weins, was a resident of a nursing home in West Bloomfield, Michigan. In August 2006, she fell and hit her head. Weins was taken to a hospital, where she

died two weeks later. Waeschle suspected that abuse or neglect caused the fall. To investigate, the West Bloomfield Township Police Department requested that an autopsy be performed on Weins's body. Waeschle did not challenge the request.

Dr. Ruben Ortiz-Reyes was the Deputy Oakland County Medical Examiner who conducted the autopsy. This required Dr. Ortiz-Reyes to remove and examine various organs, including Weins's brain, for clues regarding the cause of her death. To examine a brain, it must be soaked in a formaldehyde-like solution until it becomes stiff enough to dissect. The soaking process normally takes 10 to 14 days. With the exception of the brain, the other organs that Dr. Ortiz-Reyes examined were placed back into the body

When Weins's body (minus the brain) was made available to Waschle, the latter cremated the remains. Waeschle disposed of her mother's body without knowing that the brain was not included. The Medical Examiner failed to notify Waeschle that her mother's body was being returned without the brain or that the Medical Examiner planned to incinerate it once the examination of that organ was completed.

Several months later, after disposing of her mother's body, Waeschle met with the Deputy Medical Examiner and was provided a copy of the autopsy report. At that time, Waeschle learned that her mother's brain had been incinerated as medical waste without her consent. This litigation followed.

B. Procedural background

As amended, Waeschle's complaint alleged that the Medical Examiner violated Waeschle's Fourteenth Amendment right to due process by not returning her mother's brain for disposal after the autopsy of that organ was completed. Waeschle also claimed that Dragovic negligently and intentionally inflicted emotional distress on her in violation of state law. In June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. He also filed a motion to dismiss the state-law causes of action. In the alternative, Dragovic urged the district court to certify the state-law issues to the Michigan Supreme Court.

The district court dismissed the state-law claims. As for the due process claim, the court found that Waeschle had established that (1) she had a quasi-property interest in her mother's brain that was protected under the United States Constitution, and (2) the Medical Examiner deprived her of that interest while acting under color of state law. The court also found that Dragovic was not entitled to qualified immunity because the quasi-property interest was "clearly established" and because the Medical Examiner "reasonably should have known" that he was violating Waeschle's Fourteenth Amendment right.

II. ANALYSIS

A. Standard of review

This appeal involves the denial of a qualified-immunity claim, which was set forth in Dragovic's motion for summary judgment. "We review a district court's denial of qualified immunity de novo." *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

B. Section 1983 and the qualified-immunity framework

Section 1983 serves as a vehicle to obtain damages caused by persons acting under color of state law whose conduct violates the U.S. Constitution or federal laws. *McQueen v. Beecher Comty. Schs.*, 433 F.3d 460, 463 (6th Cir. 2006). "A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity." *Drogosch v. Metcalf*, 557 F.3d 372, 377 (6th Cir. 2009). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816 (citations omitted). And

> if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Id. (citation omitted).

In *Pearson*, however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that

> [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional

> right is not clearly established but far from obvious whether in fact there is such a right.

Id.

Our qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established.

C. Clearly established constitutional rights

The "clearly established" prong of the two-step *Saucier* analysis is particularly important for the present case. This court has clarified that

> [f]or a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's conduct must be apparent in light of pre-existing law.

Durham v. Nu'Man, 97 F.3d 862, 866 (6th Cir. 1996). "A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred." *Id.*

Waeschle complains that Dragovic violated her right to dispose of her mother's brain when he did not give her the opportunity to recover it for the purpose of burial or cremation. But whether Waeschle has this

right under state law is far from clear. Before explaining why, we will set forth the framework governing the analysis of procedural due process claims to provide further context for the claim at stake in this appeal.

1. Due process framework

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (citation omitted).

This appeal concerns the question of whether Waeschle has a constitutionally protected property interest under the first element listed above. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (internal quotation marks omitted)).

Although property rights are principally created by state law, "whether a substantive interest created by the state rises to the level of a constitutionally

protected property interest is a question of federal constitutional law." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. 1995). "Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. The due process clause only protects those interests to which one has a legitimate claim of entitlement." *Brotherton v. City of Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citations and internal quotation marks omitted). In the next subsection, we address the issue of whether Dragovic deprived Waeschle of a clearly established, constitutionally protected property right to her mother's brain without due process of law.

2. White's claimed property right is not clearly established

Waeschle cites two cases from this court in support of her claim that she has a clearly established property right to her mother's brain: *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995). Each of these cases involves the removal of corneas from dead bodies without the authorization of the decedent's next of kin. Because the court in *Whaley* considered itself bound by *Brotherton*, we will discuss the cases in chronological order.

In *Brotherton*, the plaintiff's husband was discovered in his car without a pulse. He was taken to a hospital in Cincinnati, Ohio, where he was declared dead on arrival. The plaintiff declined to donate her husband's organs. Because the death might have been a suicide, the hospital transferred the body to the county coroner's office for an autopsy. After the autopsy was completed, the coroner permitted the

removal of the decedent's corneas for storage in an eye bank. The hospital had failed to inform the coroner that the plaintiff did not want her husband's body parts removed for donation. Nor did the coroner ask whether there were any such objections before allowing the removal of the corneas. In fact, an Ohio statute "permitted a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body." *Brotherton*, 923 F.2d at 478 (citing Ohio Rev. Code § 2108.60).

The plaintiff in *Brotherton* sued the county coroner under 42 U.S.C. § 1983, alleging that she was deprived of her property rights in violation of the Due Process Clause because her husband's corneas had been removed without her consent. *Id.* at 478-79. Although the district court dismissed the complaint for failing to state a claim, this court reversed, holding that "the aggregate of rights granted by the state of Ohio to [the plaintiff] rises to the level of a legitimate claim of entitlement in [the decedent's] body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.* at 482 (internal quotation marks omitted).

In reaching this conclusion, the *Brotherton* court impliedly conceded that the widow's rights to her husband's dead body were quite limited. The court acknowledged, for example, that Ohio courts had expressly declined to recognize that the next of kin have vested property rights in the bodies of their deceased relatives. *Id.* at 480 (citing *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35

(Ohio Ct. App. 1986)). On the other hand, the court noted that "property" is traditionally conceptualized as a bundle of rights, including "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.* at 481. Moreover, there was little doubt that Ohio law afforded the next of kin at least some of these rights with respect to their relative's body. *See id.*

The court in *Brotherton* emphasized that the plaintiff had the right under Ohio law to possess her husband's body for the limited purpose of conducting a burial or other lawful disposition. *Id.* at 482. Another right of the next of kin is to make an anatomical gift of their relatives' organs. *See id.* at 478 ("The hospital asked [the plaintiff] to consider making an anatomical gift; she declined . . . ."). *Brotherton* concluded that these limited rights, even though they were not labeled property rights by the Ohio courts, formed the basis of a constitutionally protected property interest in the decedent's body, including the corneas. *Id.*

Whaley involved similar facts. Two Michigan counties hired a pathologist to conduct autopsies on a contractual basis. The counties entered into an agreement pursuant to which the pathologist's assistant was allowed to remove a decedent's corneas without the consent of the next of kin. In return, the pathologist's assistant, who stood to profit from selling the corneas, agreed to bear "all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not." *Whaley*, 58 F.3d at 1113.

Once this cornea-removal practice was discovered, a class of plaintiffs sued the counties, alleging that

"they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedents' eyeballs or corneas." *Id.* The district court dismissed their complaint after concluding that Michigan law did not create rights that qualified as constitutionally protected property interests under the Due Process Clause. *Id.*

Just as in *Brotherton*, however, this court reversed the district court's judgment, holding that "the next-of-kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes." *Id.* at 1117. The court reasoned that it was bound by *Brotherton* because Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Id.* at 1114. One such right is that of the next of kin "to possess the body for burial and prevent its mutilation." *Id.* This right was inferred from several Michigan Supreme Court cases recognizing a cause of action for the unlawful mutilation of a corpse. *See id.* (citing, for example, *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body.")) The next of kin also have the right to choose whether to make "a gift of all or part of the decedent's body, at least when there is no contrary intent evidenced by the decedent." *Whaley*, 58 F.3d at 1116. In sum, the court concluded that

> the next of kin have the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation. Applying *Brotherton*, we therefore hold that Michigan

> provides the next of kin with a constitutionally protected property interest in the dead body of a relative.

Id.

Waeschle contends that the same basic reasoning found in *Brotherton* and *Whaley* controls this appeal. Her argument is, in essence, that her mother's brain is no less constitutionally protected than are eyes or corneas. She also contends that the cornea cases serve to satisfy the second prong of *Saucier*'s qualified-immunity analysis because they allegedly demonstrate that the right to her mother's brain was clearly established.

Brotherton and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

A pair of cases decided in the Southern District of Ohio on this very issue illustrate the conflicting viewpoints. The first case, *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704, at *4-5 (S.D. Ohio Sept. 28, 2005), supports Waeschle's position. In *Hainey*, the plaintiffs brought a class-action lawsuit after learning, as Waeschle did, that they had buried their loved ones' bodies without the brains because the

latter had been removed during autopsy and retained for further study. The Ohio coroner moved for, and the district court denied, summary judgment on the basis of qualified immunity.

According to the district court in *Hainey*, the plaintiffs had a legitimate claim of entitlement to the decedents' brains in light of *Brotherton*. *Brotherton*'s holding, the court continued, broadly included "the right to take possession of what remains of the deceased's body following the completion of the autopsy." *Hainey*, 2005 WL 2397704, at *6. The court further concluded that "*Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment." *Id.* at *8. This purportedly clear ruling, furthermore, rendered the coroner ineligible for qualified immunity because "a reasonable coroner in this judicial circuit would have known that disposing of body parts without notice to the decedent's next of kin would have violated that right." *Id.*

Hainey therefore supports Waeschle's claim. But subsequent caselaw in Ohio reaches the opposite conclusion. The same district court, in *Albrecht v. Treon*, No. 1:06cv-274, 2007 WL 777864, at *1 (S.D. Ohio March 12, 2007) (*Albrecht I*), considered a virtually identical fact pattern as the one addressed in *Hainey*. A lawsuit was filed against the coroner of Clermont County, Ohio after the plaintiffs discovered that the coroner "had removed their son's brain for forensic examination and retained it after the autopsy." *Albrecht I*, 2007 WL 777864, at *1. In response, the coroner argued that the court in *Hainey* had misinterpreted applicable Ohio law. *Id.* The

coroner requested that the district court certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at *2.

Acknowledging that Ohio law affords the next of kin a custodial right in the body of the decedent, the district court nevertheless concluded that the right does not "automatically confer to the next of kin a protected right in 'body parts' of a decedent removed and retained by the coroner for forensic examination and testing." *Id.* at *5. The court emphasized that an Ohio statute appeared to severely restrict the rights of the next of kin to body parts or tissues collected during the course of an autopsy. *Id.* (citing Ohio Rev. Code § 313.123(B)(1) (2006) , which provides that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws").

Indeed, there was only one exception to this medical-waste disposal requirement, triggered by religious considerations. *Id.* (citing Ohio Rev. Code § 313.123(B)(2), which states that the coroner must return specimens to the person who has the right to the disposition of the body if "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs."). Despite this statute's

provision stating that autopsy specimens are to be treated as medical waste, the district court granted the coroner's request to certify the issue to the Ohio Supreme Court after concluding that none of the existing Ohio authorities resolved the precise issue of whether the next of kin had a right to dispose of body parts that had been collected during an autopsy. *Albrecht I*, 2007 WL 777864, at *5–6.

The Ohio Supreme Court accepted the certified question for review and repudiated the plaintiffs' position, holding that "the next of kin of a decedent upon whom an autopsy has been performed *do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing*." *Albrecht v. Treon*, 889 N.E.2d 120, 122 (Ohio 2008) (*Albrecht II*) (emphasis added). In reaching this conclusion, the court distinguished *Brotherton*, reasoning that "*Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case." *Id.* at 124. The corneas in *Brotherton* were extracted pursuant to an Ohio statute that permitted their removal even when doing so was not necessary to conduct a forensic examination. 923 F.2d at 478-79. Different interests are at stake, according to the Ohio Supreme Court, when tissue is taken for lawful investigative purposes:

> [A] deceased's next of kin *had no protected right in autopsy specimens pursuant to Ohio statutes*. The Ohio Revised Code authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary. A coroner's forensic examination is a classic function of the police

> power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time.

Albrecht II, 889 N.E.2d at 126-27 (citation omitted) (emphasis added).

Furthermore, the Ohio Supreme Court noted that its conclusion did not depend on the existence of the 2006 statute that designated autopsy specimens as medical waste. *Id.* at 126 (holding that "[e]ven before [Ohio Rev. Code § 313.123(B)] was enacted, a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes"). *Albrecht II* clearly raises a question as to the scope of the quasi-property right at issue in both *Brotherton* and *Whaley* where forensic specimens are collected in the course of criminal investigations (as in the present case).

Waeschle's property rights, of course, are not defined by Ohio law. But *Whaley* observed that Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Whaley*, 58 F.3d at 1115. The Ohio Supreme Court's decision in *Albrecht II* is therefore relevant in assessing whether the same right is clearly established under Michigan law. And the Court's decision in *Albrecht II*, which explicitly denied that the next of kin have a right to body parts collected for forensic examination, suggests that such a right would probably not be recognized under existing Michigan law.

But our analysis is not based exclusively on the analogy to cases construing Ohio law. Instead, our independent review of Michigan law fails to establish an unequivocal post autopsy right to specimens taken for the purpose of a lawful criminal investigation. One of the cases from the Michigan Supreme Court cited by Waeschle recognizes a cause of action for the unlawful and intentional mutilation of dead bodies. *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body."). Another recognizes the next of kin's right to control a relative's body for the limited purpose of securing a burial. *Doxtator v. Chicago & W.M. Ry. Co.*, 79 N.W. 922, 922 (Mich. 1899) (recognizing that, although there was "no property in a dead body [at common law], . . . the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way").

But these cases, as well as others cited by Waeschle, fail to address the question of body parts retained for forensic examination. *See Keyes v. Konkel*,78 N.W. 649, 649 (Mich. 1899) (observing that various state courts have considered dead bodies to be "quasi property," and recognizing a tort for infringing on a next of kin's right to have an unmutilated dead body delivered for burial); *Dampier v. Grace Hosp. Corp.*, 592 N.W.2d 809 (Mich. Ct. App. 1999) (addressing causes of action available against coroners who allowed the decomposition of a dead body in their

possession); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) ("While there is no property right in the next of kin to a dead body, . . . Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body . . . ."). None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

Nor does Waeschle identify any Michigan statute that unambiguously sets forth a Medical Examiner's duties regarding how he or she should dispose of particular body parts collected for the purposes of an autopsy. One statute authorizes Medical Examiners to retain, "as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime." Mich. Comp. Laws § 52.205 (emphasis added). The same statute instructs Medical Examiners to "promptly deliver or return *the body* to relatives or representatives of the deceased." *Id* (emphasis added). Another statute cited by Waeschle simply describes the right of the next of kin to make decisions regarding, for example, funeral arrangements. *See id.* § 700.3206(1).

Waeschle argues that the above provisions create the right to a prompt return of her mother's brain after the Medical Examiner had completed the autopsy. But the statutory language does not specify whether each and every body part or specimen collected during the course of an autopsy must be returned to the next of kin on a piecemeal basis. Such a requirement might prove totally impracticable.

In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal. Not a single case instructed Dragovic to treat the brain in any manner other than the way he did. Nor did any Michigan statute unambiguously instruct Dragovic on how to dispose of individual body parts retained for forensic examination as opposed to dealing with the body as a whole.

Waeschle's alleged constitutionally protected property right to her mother's brain is therefore not clearly established because the underlying state-created property interest is not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Drogosch v. Metcalf*, 557 F.3d 372, 379 (6th Cir. 2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For that reason, Dragovic is entitled to summary judgment on the basis of qualified immunity. *See Drogosch*, 557 F.3d at 379.

To avoid any misunderstanding, we wish to clarify the limits of this holding. There is nothing in the preceding analysis that is intended to suggest that Michigan law clearly establishes that the next of kin have *no* quasi-property interest in body parts collected during the course of an autopsy for forensic examination. Nor is the discussion meant to foreclose the possibility that, if Michigan establishes such a right in the future, the interest would rise to the level of a constitutionally protected property right under the Fourteenth Amendment. In light of *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), however, we are under no obligation to determine the existence or the

scope of Waeschle's right to her mother's brain in the present case.

We also wish to acknowledge that Waeschle's shock in learning that her mother's brain was incinerated as medical waste is understandable. And the possibility exists that Michigan might in the future decide to recognize a right to recover organs that were originally retained as part of a lawful criminal investigation. Such a right would also presumably have to distinguish between major body parts (to which individuals like Waeschle would have a right to possess for the purpose of burial or cremation) and insignificant tissue samples (to which no such right would attach). But Michigan law as presently developed does not clearly recognize that such a custodial right to body parts exists. And whether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualifiedimmunity test as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).

D. Certification

In addition to raising the qualified-immunity question, Dragovic argues that the district court erroneously declined to certify certain issues of state law to the Michigan Supreme Court. But this issue is moot because Dragovic is entitled to qualified immunity without such certification in light of our determination that Waeschle's alleged right to her mother's brain is not yet clearly established under Michigan law.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to **GRANT** Dragovic's motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed July 22, 2009]

KAREN WAESCHLE,
Plaintiff - Appellee,

v.

LJUBISA J. DRAGOVIC,
Defendant - Appellant.

Before: GILMAN and MCKEAGUE, Circuit Judges; BARRETT, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED with instructions to GRANT defendant Ljubisa J. Dragovic's motion for summary judgment.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NUMBER: 08-10393
HONORABLE VICTORIA A. ROBERTS

[Filed September 19, 2008]

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Plaintiff(s),

v.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and on behalf of others similarly situated,

Defendant(s).

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Defendants' "Motion to Strike Plaintiff's Sur-Reply Brief." (Doc. #58). Defendants ask the Court to strike Plaintiff Karen Waeschle's ("Waeschle") sur-reply because it is not authorized under the local rules or the Court's June 3, 2008 scheduling order. Waeschle agrees that her sur-reply is not authorized, but asks the Court to grant leave to file the sur-reply. Waeschle's request is denied; Defendants' motion is **GRANTED**.

Also before the Court is Defendants' "Motion for Summary Judgment, Certification of a Question of Michigan Law and Dismissal." (Doc. #49). Defendants ask the Court to dismiss Waeschle's Complaint because: (1) Waeschle does not have a constitutionally protected property interest in a deceased relative's body parts; and (2) they are either entitled to governmental immunity on her state law claims, or, her state law claims fail to state a claim upon which relief can be granted.

If the Court finds Waeschle has a constitutionally protected property interest in a deceased relative's body parts, Defendants ask the Court to find they are entitled to qualified immunity because that interest is not clearly established.

In the alternative, Defendants ask the Court to certify this question to the Michigan Supreme Court: Does Waeschle have a constitutionally protected property interest in a deceased relative's body parts that are removed during a lawful autopsy to determine the cause of death?

Oral argument was heard on September 16, 2008.

For the following reasons, Defendants' motion is **GRANTED IN PART AND DENIED IN PART**. The Court finds Waeschle has a federally protected constitutional right to her mother's body parts, grounded in the Fourteenth Amendment Due Process Clause. That right is clearly established. Because this is a federal cause of action, it is not necessary to certify a question to the Michigan Supreme Court.

II. BACKGROUND

Waeschle's mother, Katherine Weins ("Weins"), lived in the Bortz Nursing Home. On August 28, 2006, the nursing home staff discovered Weins lying on the floor in a pool of blood. Weins was transported to the Huron Valley Hospital; the hospital diagnosed her with a closed head injury and scalp laceration.

Weins died on September 7, 2006. Because there was a suspicion that the nursing home staff neglected or abused Weins: (1) the West Bloomfield Township Police Department initiated a criminal investigation; and (2) Dr. Ruben Ortiz-Reyes ("Dr. Ortiz-Reyes"), an Oakland County Deputy Medical Examiner, conducted an autopsy on September 8, 2006 pursuant to Michigan law. *See* MCLA §52.202(1) ("A county medical examiner or deputy county medical examiner shall investigate the cause and manner of death of an individual under each of the following circumstances: (a) The individual dies by violence[;] (b) The individual's death is unexpected").

During Weins's autopsy, Dr. Ortiz-Reyes removed her brain and placed it in formaldehyde for further

studies. According to Dr. Ljubisa J. Dragovic, the Oakland County Medical Examiner, the standard procedure is to retain a deceased person's brain for further studies when the individual suffered a closed head injury and a criminal investigation is pending. That procedure is authorized by Michigan law. *See* MCLA §52.205(5) ("the medical examiner may retain, as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime"). After a forensic examination, Defendants say Weins's brain was disposed of as medical waste.

Waeschle discovered Weins was cremated without her brain after she read the autopsy report. Her Complaint against Defendants alleges: (1) Defendants violated her Fourteenth Amendment due process rights by depriving her of Weins's brain without prior notice; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress. Waeschle does not contest the medical examiner's authority to remove the brain for forensic examination.

III. STANDARD OF REVIEW

Waeschle's Fourteenth Amendment due process claim is reviewed under the summary judgment standard. Her state law claims are reviewed under Fed. R. Civ. P. 12(b)(6).

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." In reviewing a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

The movant has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets this burden, the nonmoving party must, by affidavit or otherwise as provided by Rule 56, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. If the nonmoving party does not respond with specific facts showing a genuine issue for trial, summary judgment is appropriate. *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989).

When reviewing a motion under Fed. R. Civ. P. 12(b)(6), the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Fed. R. Civ. P. 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling

on such a motion] to weigh evidence or evaluate the credibility of witnesses." *Miller*, 50 F.3d at 377 (citing *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994)). However, while this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240 (citations omitted).

IV. APPLICABLE LAW AND ANALYSIS

A. The Fourteenth Amendment Due Process Protections

To succeed on her 42 U.S.C. §1983 claim, grounded in the Fourteenth Amendment Due Process Clause, Waeschle must prove: (1) the deprivation of a property right "secured by the Constitution and the laws" of the United States; and (2) Defendants deprived her of that right acting under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The parties do not dispute that Dr. Ortiz-Reyes was acting under color of state law when he removed/retained Weins's brain for further studies. Indeed, MCLA §52.205(5) permits the medical examiner to retain any portion of a deceased person's body necessary for the detection of crime.

The issue in this case is whether Waeschle has a property interest in Weins's brain – protected by the United States Constitution – such that she was

entitled to notice that Weins's brain was not included with her other remains.

Property interests are created and their dimensions are defined by state law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This Court can look to the Michigan Supreme Court or other indicia of state law to determine if there is a declared property interest in a deceased relative's remains/body parts. *See Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (looking to "other indicia of state law," including state appellate court decisions to determine whether plaintiff has a protected property interest in her deceased husband's corneas); *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984).

Michigan law regarding general property rights are anchored in the right to possess. For example, *see* M Civ JI 19.02 – Possessor of Land – Definition. This standard instruction defines a "possessor" as, *inter alia*, a person who has the right to immediate occupation of land. The Court in *Brotherton* says Ohio avoided calling the surviving spouse's interest "property," but recognized that Ohio does grant the right to *possess* body parts of deceased relatives. *Brotherton*, 923 F.2d at 480-81 (citing *Everman v. Davis*, 54 Ohio App.3d 119, 122 (1989)).

While the legal definition of property is often tied to a physical object, the law of property has become more abstract, and a property right is often conceptualized as a "bundle of rights." *See Brotherton*, 923 F.2d at 481 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). These rights include the right to possess, to use, to

exclude, to profit, and to dispose. *Brotherton*, 923 F.2d at 481.

Importantly, the United States Supreme Court held that "'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (quoting *Roth*, 408 U.S. at 577).

If a determination is made that the next-of-kin have a state protected property interest in a deceased relative's body parts/remains post-autopsy, the issue then is whether that interest rises to the level of a "legitimate claim of entitlement," because the Due Process Clause only protects those interests which rise to such a level. *Roth*, 408 U.S. at 577. Whether an interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause, is determined by federal law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citing *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 602). "This determination does not rest on the label attached to a right granted by the state but rather on the substance of that right." *Brotherton*, 923 F.2d at 482 (citing *Mathews v. Eldridge*, 424 U.S. 319, 332; *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Waeschle relies on *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995) and *Dampier v. Grace Hosp. Corp.*, 233 Mich.App. 714 (1999). However, the Michigan Supreme Court, as far back as 1899, addressed the interest that next-of-kin have in a deceased relative's body parts.

Doxtator v. Chicago & W. Michigan Ry. Co., 120 Mich. 596 (1899) stated the defendants were entitled to a directed verdict, not because the widow had no possessory interest in her deceased husband's remains, but because she sued the wrong party. In *Doxtator*, Thomas A. Doxtator's ("Mr. Doxtator") legs were crushed while he worked at the Chicago & West Michigan Railway Company ("Railway Company"). *Doxtator*, 120 Mich. at 597-98. Mr. Doxtator's co-workers called an ambulance to take him to the hospital. *Id.* at 598. The doctors knew, upon Mr. Doxtator's arrival, that his injuries were fatal. Nevertheless, Dr. Wooster, a Railway Company employee, amputated Mr. Doxtator's legs. *Id.* at 598-99. After the operation, the orderly of the hospital burned the fragments. *Id.* at 599. Mr. Doxtator's wife sued the Railway Company, which turned the body over to the hospital. The Michigan Supreme Court held that:

> the one whose duty it is to care for the body of the deceased is entitled to *possession* of the body, as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way.

Id. at 597 (citations omitted) (emphasis added). In this holding, the court found Dr. Wooster had a duty to operate on Mr. Doxtator, but not the duty to ensure Mr. Doxtator's remains were delivered to his widow when death ensued. *Id.* at 600-01.

In *Keyes v. Konkel*, 119 Mich. 550 (1899), after the undertaker fitted the body for burial, he refused to release it until payment. *Keyes*, 119 Mich. at 550. The

Michigan Supreme Court held that next-of-kin have a quasi-property right to control/bury a dead body. *Id.* at 551 (citations omitted). The Court held that the cause of action was "not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation." *Id.*

Deeg v. City of Detroit, 345 Mich. 371 (1956) relies on *Doxtator* to hold plaintiff had a cause of action when she did not give permission for an autopsy, and organs were removed unnecessarily. *Deeg*, 345 Mich. at 376-77 (rev'd on other grounds).

All of the above cases are long-standing Michigan Supreme Court cases which acknowledge the possessory interest that next-of-kin have in a deceased relative's remains, and that they have a right to the return of body parts.

Whaley recognized that Michigan law is substantively identical to Ohio law, but "[Michigan] courts have explicitly held what Ohio courts have not: that the next of kin have a right to possess the body for burial and prevent mutilation." *Whaley*, 58 F.3d at 1114-15.

Dampier is simply the latest pronouncement of Michigan courts on the subject; it recognized that plaintiff stated a federal constitutional claim for violation of a property right, *See Dampier*, 233 Mich.App. at 735, and based its holding on *Whaley*, which relied on *Doxtator*, *Keyes* and *Deeg*. The *Dampier* court pointed out an important part of the *Whaley* holding – albeit in a footnote – when it stated that:

> the Sixth Circuit Court of Appeals did not believe that the fine distinctions made by the Ohio and Michigan courts regarding the labels to be assigned this right were of any particular significance to its decision and stated that the rights of the next of kin in the body were at the "heart and soul of the common law understanding of 'property.'"

Id. at 735 n.3 (quoting *Whaley*, 58 F.3d at 1115).

Further, Michigan statutes address the possessory interest that next-of-kin have in a deceased relative's remains/body parts. *See e.g.*, MCLA §700.3206(1) ("Subject to [MCLA §52.205(5)], a [next-of-kin] is presumed to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to possess cremated remains of the decedent"); MCLA §52.205(5) ("the medical examiner may retain, *as long as may be necessary*, any portion of the body believed by the medical examiner to be necessary for the detection of any crime") (emphasis added). The power of the medical examiner to retain a deceased person's remains/body parts ends once the cause of death is determined. Upon completion of the autopsy, the next-of-kin are entitled to possession of their deceased relative's remains "as [they are] when death comes" (i.e., the complete body). *See Doxtator*, 120 Mich. at 597.

Based on Michigan Supreme Court precedent, as interpreted by the Sixth Circuit Court of Appeals, this Court holds that Waeschle states a 42 U.S.C. §1983

cause of action under the Fourteenth Amendment Due Process Clause.

The Court is not persuaded by *Albrecht v. Treon*, No. 2008-Ohio-2617 (S.D. Ohio June 5, 2008), relied on by Defendants. This Court's analysis – grounded in whether Waeschle has a property interest in her mother's remains – does not depend on whether Weins's brain was removed pursuant to a statutorily mandated autopsy or for a charitable purpose. Also, *Albrecht* was decided under Ohio law, and the Ohio General Assembly had enacted a statute which classified autopsy specimens as "medical waste" and authorized the coroner to dispose of it as such.

Defendants characterize the holding in *Keyes* as mere dicta which cannot be relied on by this Court as a definitive statement by the Michigan Supreme Court regarding the rights of family members to the body parts of deceased relatives.

The Court disagrees. In *Keyes*, plaintiff brought a replevin action, which was the correct cause of action to recover personal goods or chattel unlawfully taken. The Court necessarily had to determine that the corpse did not fall into the category of personal goods or chattel; rather, the court found that defendant infringed on the right of the next-of-kin to have the body delivered to him for burial without mutilation. *See Keyes*, 119 Mich. at 550-51.

Similarly, the holding in *Deeg* was not dicta. Two questions were presented in that appeal: Did the widow have a cause of action for mutilation when no one authorized an autopsy and organs were removed; and, if so, did her cause of action survive her own

death? Critical to the court's holding on the first question was that there was a person entitled to the possession, control and burial of the body; otherwise, there could not have been a finding that there was a duty to not unlawfully and intentionally mutilate it. *See Deeg*, 345 Mich. at 375. This critical holding also was the underpinning of the court's second holding: that because it was a personal right to possession, the right did not survive the widow's own death. *See id.* at 379.

Finally, the Court believes the language in *Doxtator* was not dicta. The *Doxtator* court could not have reached the issue of whether Dr. Wooster had the duty to return Mr. Doxtator's body to his widow when death ensued, if Michigan did not recognize the next-of-kin's right to a deceased relative's remains/body parts.

The Sixth Circuit Court of Appeals confirms that the Michigan Supreme Court's holding regarding a next-of-kin's interest in a deceased relative's remains/body parts is not dicta. *See Whaley*, 58 F.3d at 115 ("The Supreme Court of Michigan has repeatedly held that the next of kin '[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it any way'") (citing *Doxtator*, 120 Mich. at 597; *Keyes*, 119 Mich. at 551; *Deeg*, 345 Mich. at 376).

Since this Court is not limited in its review to state supreme court decisions, but can look to "other indicia of state law," such as appellate decisions, *See Brotherton*, 923 F.2d at 480, the Court is further persuaded that Michigan recognizes that next-of-kin have some property interest in the remains of deceased

relatives. Waeschle alleges the existence of "rules and understandings" which justify her "legitimate claim of entitlement" to her mother's body parts. *See Perry*, 408 U.S. at 601-03 ("A person's interest . . . is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim . . . and that he may invoke at a hearing").

Although the facts in prior precedent are not directly on point, there is a close correspondence between prior precedent and Waeschle's case. The Court finds this nexus is sufficient to support Waeschle's Fourteenth Amendment due process claim.

B. No Reason to Certify a Question to the Michigan Supreme Court

"When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may . . . certify the question to the Michigan Supreme Court." MCR 7.305(B)(1).

This Court finds no question that Michigan law may resolve is presented here. The property right is sufficiently established, and whether that right rises to the level of a "legitimate claim of entitlement," protected by the Due Process Clause of the Fourteenth Amendment, is a matter of federal law. *See Memphis Light, Gas & Water Div.*, 436 U.S. at 9.

Further, the Court declines to certify a question to the Michigan Supreme Court simply because the facts of Waeschle's case are similar to *Albrecht*, where the court did certify a question to the Ohio Supreme Court.

When *Albrecht* was decided, the Ohio Supreme Court had not considered whether next-of-kin have a property interest in a deceased relative's remains/body parts. Importantly, the Michigan Supreme Court decided that issue in 1899.

There is a genuine issue of material fact regarding whether Defendants violated Waeschle's due process right to notice that Weins's remains did not contain her brain.

V. CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

In addition to Waeschle's burden to prove Defendants violated a constitutional right, Waeschle must prove the right is "clearly established." *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). The Court must decide: (1) did Waeschle identify a clearly established constitutional right that was violated?; and (2) whether Defendants reasonably should have known their conduct was in violation of that right. *Collins v. Crabbe*, 1999 WL 55279 at *2 (6th Cir. Jan. 12, 1999) (citing *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991)); *see also Durham v. Nu'Man*, 97 F.3d 862, 868 (6th Cir. 1996):

> For a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's conduct must be *apparent* in light of pre-existing law. A right is not considered clearly established unless it has been authoritatively decided by the United States

> Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred.

(citations omitted) (emphasis added).

If Waeschle's constitutional right is not a clearly established right, Defendants are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). And, summary judgment on Waeschle's due process claim is appropriate. *See Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988) (citing *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987)).

Citing *Blake v. Wright*, 179 F.3d 1003 (6th Cir. 1999), Defendants argue that Waeschle's constitutional right was not clearly established because they acted under the authority of a Michigan statute. *See Blake*, 179 F.3d at 1010-13 (holding defendant is entitled to qualified immunity for a statutory violation if the law is not clearly established).

The Court finds that Waeschle's constitutional right to notice that she did not receive Weins's brain is clearly established for two reasons. First, the Michigan Court of Appeals authoritatively decided that the next-of-kin have a cognizable claim under the Fourteenth Amendment for violation of the right to a deceased relative's body, *See Dampier*, 233 Mich.App. at 737, therefore, "[t]he unlawfulness of [Defendants'] conduct [was] apparent in light of pre-existing law." *See Durham*, 97 F.3d at 688.

Second, Michigan law authorizes autopsies and the removal/retention of organs "as long as may be

necessary" for forensic examination when a criminal investigation is pending. *See* MCLA §§ 52.202(1); 52.205(5). This language presumes that the retention is for a limited period of time. Defendants do not cite a Michigan statute that gives them the authority to release a deceased person's body and not inform the next-of-kin that an organ is missing. Nor do they cite a statute that allows retention beyond the time necessary for forensic examination.

Indeed, Michigan law favors the release of a deceased person's complete body to the next-of-kin. *See* MCLA §52.205(4) ("The medical examiner shall . . . notify immediately as compassionately as possible the next of kin of the death and the body"); MCLA §52.205(5) ("The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased"); *see also Whaley*, 58 F.3d at 1115 (Michigan law provides the next-of-kin with a "right to possess the body for burial and prevent its mutilation").

Based on Michigan's clearly established law that the next-of-kin have an interest in their deceased relative's remains/body parts, Defendants reasonably should have known they were violating Waeschle's right when Weins's brain was removed/retained without notice to Waeschle.

VI. STATE LAW CLAIMS

A. Negligent Infliction of Emotional Distress

Waeschle can only recover for negligent infliction of emotional distress if she "witnesse[d] negligent injury to a third person and suffer[ed] mental disturbance as

a result." *See Duran v. Detroit News, Inc.*, 200 Mich.App. 622, 629 (1993).

Waeschle's negligent infliction of emotional distress claim fails to state a claim upon which relief can be granted and is dismissed for two reasons. First, Waeschle does not allege that she witnessed a negligent injury to Weins. The stated cause of action is removal of body parts and failure to give notice of the removal, and retention of body parts.

Second, negligent infliction of emotional distress is not the appropriate cause of action for the failure to notify family members that their deceased relative's body does not have all of its organs.

B. Intentional Infliction of Emotional Distress

When the Court construes Waeschle's Complaint liberally in her favor and accepts all factual allegations as true, *See Miller*, 50 F.3d at 377, her intentional infliction of emotional distress claim fails as a matter of law. The Complaint contains the "bare assertion of legal conclusions" insufficient to survive a motion to dismiss. *See DeLorean*, 991 F.2d at 1240. For example, Waeschle's Complaint simply alleges that "each next-of-kin will have a cause of action for . . . intentional infliction of emotional distress."

Even if Waeschle's Complaint alleged "direct or inferential allegations respecting all the material elements to sustain a recovery [for intentional infliction of emotional distress]," *See id.*, Waeschle's claim would still fail as a matter of law.

To succeed on her claim for intentional infliction of emotional distress, Waeschle must prove: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 602 (1985). Liability has only been found:

> where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 602-03 (quoting Restatement (Second) of Torts §46, comment d, p. 72-73).

"It is generally the duty of the trial court to determine whether a defendant's alleged conduct may reasonably be regarded as so 'outrageous.' Where reasonable minds may differ, the question is for the jury." *Garretson v. City of Madison Heights*, 407 F.3d 789, 799 (6th Cir. 2005) (internal citation omitted).

It is not "utterly intolerable in a civilized community," *See Roberts*, 422 Mich. at 603, to retain a deceased person's brain for further examination after the completion of a lawful autopsy without notifying the next-of-kin. Indeed, the statute authorizes the removal and retention of body parts "as long as may be necessary . . . for the detection of . . . crime." MCLA §52.205(5).

C. Additional State Law Claim

Waeschle contended at oral argument that under established precedent, she has a state law claim for the retention and destruction of her mother's body part without notice. This may be true, but neither negligent nor intentional infliction of emotional distress is the correct cause of action.

VII. CONCLUSION

Defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. The Court dismisses Waeschle's state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress. Waeschle's case, on behalf of herself and others similarly situated, will proceed on the 42 U.S.C. §1983 due process claim.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: September 19, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on September 19, 2008.

s/Linda Vertriest
Deputy Clerk

APPENDIX E

Order

Michigan Supreme Court
Lansing, Michigan

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

Rehearing No. 574

150263(22)

SC: 140263
US Dist: 08-10393

[Filed December 17, 2010]

IN RE CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

KAREN WAESCHLE,
Plaintiff,

v

OAKLAND COUNTY MEDICAL

EXAMINER and OAKLAND COUNTY,)
Defendants.)
)

On order of the Court, the motion for rehearing is considered, and it is DENIED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 17, 2010 /s/Corbin R. Davis
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed October 23, 2009]

KAREN WAESCHLE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,	)
Plaintiff-Appellee,	)
v.	)
LJUBISA J. DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, ET AL.	)
Defendants-Appellants.	)

ORDER

BEFORE: GILMAN and MCKEAGUE, Circuit Judges; and BARRETT,* District Judge.

* Hon. Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk